

# *Nova Law Review*

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# NOVA LAW REVIEW



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Criminal HIV Transmission/Exposure Laws .....*Mona Markus*

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The Inequities of Sanctions for Physicians Who  
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## Keynote Address at the Annual Nova Law Review Banquet, March 20, 1999: Civility and Professionalism in Legal Advocacy

Honorable Gary M. Farmer \*

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I am greatly honored to have been asked to be the speaker at your Law Review banquet. Nova Law School is a great asset to our community. Its graduates—especially its law review graduates—can justly take their place with any in the country. Many of the judges of my court have found their law clerks from the ranks of Nova Law Review graduates, myself included. My first two clerks were from this law school and I rank them among the best I have had. And so, I congratulate all of you for your achievement. You are indeed a credit to your school.

I must say, your invitation brought to mind a similar occasion now more than a quarter of a century ago. I was privileged to be the managing editor of the University of Toledo Law Review. And, like you, we threw an annual banquet to celebrate the rites of spring and imminent graduation. The banquet was obviously held in Toledo rather than the more hospitable environs of Fort Lauderdale in the spring. Still, after three intense years of study and labor, it was a moment to reflect on what we had done and, more importantly to all of us, where we were going. As it happens our featured speaker that night was also a judge on the state intermediate court of appeal, the Sixth District of Ohio. After the ritual opening remarks and obligatory joke, he turned to a subject that later fell from favor for a long time in the legal profession but which has since been resurrected today and has become, as one of my colleagues calls it, “the new religion.” The subject was of course “Civility and Professionalism” and I should like to take it up briefly tonight, for it made a lasting impression on me.

It is fitting that I raise this subject with you even though you have yet to sit for the Bar exam, much less take the oath of a lawyer. You have not yet been ensnared by the seductions of legal practice. Each of you is, in a professional ethical sense, a *tabula rasa*. Each of you is free from any compromises with the lawyers oath. What I hope to do now is plant little seeds in you of a determined civility before you have responded to the temptation to become like some media lawyers — to begin your careers with a mindset to do something about the low esteem into which our profession has slipped.

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\* District Judge, State of Florida Court of Appeal Fourth District, 1991 to present; B.A., Florida Atlantic University, 1970; J.D., University of Toledo, 1973.



I recently had occasion to participate in a seminar on civility and professionalism among lawyers sponsored by the St. Thomas More Society. For those who do not know the organization, it is a group of Catholic lawyers who are interested in perpetuating the principled ethics of the Chancellor of England under Henry VIII. As a child of the Catholic church, educated by the wonderful Ursuline nuns in Toledo, where I grew up in the parish of Rosary Cathedral, I identified with the group and its ideals and thought it altogether fitting that the Society should sponsor a seminar on the subject.

Roughly at the same time, I had a similar experience with another group, called the Inns of Court. If you haven't heard about the Inns, I urge you to look into it. Like the St. Thomas More Society, it is dedicated to advancing professionalism and ethics among lawyers. I participated in a pupillage group of the Inn of Court in Fort Lauderdale. In our presentation last November, we took scenes from Robert Bolt's magnificent play about More, "*A Man For All Seasons*," and contrasted them with skits representing events taken from the recent impeachment crisis. And so it can be said that when I accepted your kind invitation to speak tonight, civility and professionalism and Thomas More had all come together as one in my mind.

Today our profession is under attack everywhere. We are almost universally portrayed in the media as obnoxious and unprincipled. We are seen to plead our causes with vulgar hyperbole, to continuously orate at the top of our voice, and usually with abrasive personal attacks. We are shown to do anything to get clients and win cases. We are routinely portrayed as lying to courts, clients, and other lawyers, as having little interest in justice or the needs of society as a whole. We are shown as immersed in the attitude that our only goal, our only concern, is money.

One group of judges has written thus on the current incivility among lawyers:

Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil. Cardozo reminds us that 'judges are never free from the feelings of the times.'

The print and electronic media weekly carry pieces on the decline of lawyers, and the low esteem in which they are held by the public as compared to other professions. There is a perception that the public thrills at stories in which a lawyer is ridiculed, defeated or disgraced. In fact, is it just me, or do many of you have the impression from the media that legal advocacy is synonymous with incivility?

Television today is filled with lawyers as talking heads. If they aren't talking about the President and the impeachment or civil cases, they are debating whatever current trial is the obsession of the media. It seems that every subject inevitably comes down to its legal ramifications. Even some sports pages now have a section devoted only to "jurisprudence," as one daily calls it.

A large number of these lawyers in the media argue their position with striking incivility. They interrupt their opposing member; they shout over contrary views; they use personal attacks on those with whom they disagree; they treat every misstatement as intentional lying, as purposeful fraud; and they use incessant overstatement and hyperbole to characterize their own positions. Is it any wonder that many nonlawyers have come to believe that legal advocacy is what they see constantly on television.

Sadly, much of this abusive advocacy is repeated in our courtrooms by lawyers who seem to draw an inference of permissibility from media pervasiveness. Much of the legal argument I see and read in appellate cases is filled with the counterparts of all of these media sins. Many lawyers habitually interrupt their opposition; they characterize the slightest misstatement as a lie; they fill their argument with all manner of personal attacks on their opposing lawyers and parties; and they seem unable to say much without overstatement. Yet none of this is necessary to be an effective advocate, and it is usually counterproductive in our court.

Yet some in the bar denigrate these attacks on lawyers. Many lawyers and bar leaders dismiss them as the censure of the angry and uninformed. I recently read a piece by the head of a local bar association ridiculing the frequent use of the well-known quote from Shakespeare, "The first thing we do, let's kill all the lawyers" as an attack on the legal profession. The point was made, and rightly so, that in context the passage is in praise of lawyers as fundamental protectors of the rights of people. Indeed we are. But it is not enough to indicate the infelicity of that particular quote as a basis to mount an attack on lawyers. We must instead ask ourselves what lawyers and the organized bar should do about the problem of our image.

An essential basis for my message today is that these attacks have a foundation in truth and that we should strive to eliminate that basis by reforming our own conduct. To my mind, a good place to begin is the elimination of the notion—which we see early in the law schools today and fostered by the media itself—that the only purpose of lawyering is winning: prevailing in litigation, prevailing in legal advocacy, prevailing in debate on subjects in which law is an element, prevailing in statements of opinion about current events, dominating any discussion or any proceeding in any forum—just, simply winning.

I think we should condemn the win-at-all-cost mentality in our profession. While our code of professional conduct demands that we

represent our clients zealously, the duty of zeal is not a blanket excuse from the many restraints on our conduct. No one would seriously contend for example, that the duty of zeal allows a lawyer to injure his adversary to render him unable to come to the courtroom. It is appropriate therefore to begin by asking ourselves just what the duty to represent a client zealously means.

Does it mean that our duty lies only in victory, solely in the ultimate vindication of the client's position? Is the role of the lawyer to ensure that every client becomes the prevailing party? Or is our duty as advocates less connected with the result and more with the process? I submit it is the latter. The representation of clients, in my opinion, is focused on the process itself rather than the outcome.

In our adversarial system of justice, there cannot possibly be two winners in every case. The system is designed, I submit, to concentrate on the forum and the procedural and the law to be applied there. It is thought in the best interests of society that disputes are better resolved in this neutral forum with established rules that allow each side to be fairly heard. The role of the lawyer is to use every legal device *under our ethical restraints* to present the client's side of the dispute as fully as the circumstances require. This institutional design is based on the assumption that if each party is heard within the framework of prior rules of conduct and procedure before neutral decision-makers, it is more likely that the ultimate outcome will be just. The design is therefore not tied to the outcome but instead to the process. If it is fair, if all sides present their case zealously but as restrained by the rules, the probability is that the result will be fair.

I recognize that this process often presents considerable limitations or constraints in a given case. The law may be well and truly settled, the facts all but indisputable. An unambiguous statute may block the result your client seeks. But—I submit—that circumstance is inevitable in a democratic society governed by a rule of law. Indeed to be a lawyer means precisely that one is governed by, and submits to, established rules of conduct, even when the rules go against one's goals. To be a lawyer is to submit to restraints on one's liberty to act in the belief that if all are similarly restrained each has the best chance of using one's talents within that framework of rules to achieve success. That is the great paradox, I suggest, in a system of the democratic rule of law: *each one of us is actually liberated by these common restraints*.

I am reminded of a wonderful observation by Professor Freund of Harvard Law School that encapsulates the attitude that I have in mind. He once addressed the complex and insoluble problems facing law and medicine regarding the use of experimental drugs or medical procedures on consenting patients. Near the end of his piece he addressed the essential dilemma facing both doctors and the law in recognizing that there were no easy

answers, that under the law doctors could not necessarily administer any procedure or substance to a patient, that ethical restraints sometimes act as a break on scientific progress. What he said was addressed specifically to doctors and judges, but it is equally applicable to all lawyers. He wrote:

[M]edicine and law and art have an essential affinity. As the artist himself finds his freedom in the constraints of his medium, in the canons of taste and in respect for the limitations of his material, so the judge and the physician too find their freedom in their fetters, in the symbolic codes that assign them their roles and render it tolerable to make judgments involving life and death — fetters that somehow make it possible to surmount the agony and the absurdity of human decisions.

As a profession we simply cannot be so concerned with victory or the results achieved as we are today. Instead we must concentrate all of our talents, energy, and knowledge on the process itself: On making the best possible case for the client within the rules, but not in spite of them. We must find our professional freedom—and indeed our personal happiness—in remaining within the constraints of law as it affects our case. We should find the consolation of due and zealous performance of our mission in a healthy respect for our fetters, for the limitations imposed on us by the given facts, evidence, procedural rules, and substantive law. We will then find our professional freedom, not in winning or in being the prevailing party in every instance, but rather in the comfort that we have made the best possible case within those constraints.

We must be understood by the media and public—as a result of our own example of unflagging compliance with our ethical and legal codes—as dedicated to the rule of law. Again, by continued and unfailing compliance with these restraints, we must erase the current perception that our only interest is in winning. This must become true even when it is the hardest thing in the world to do. Even when our own most intimate and directly personal interests are at stake.

There is no better example of what I advocate than Thomas More. He was, as I said earlier, the Chancellor to King Henry VIII. He was in effect the highest lawyer in the realm. The King had long been married to Catherine, the daughter of the Spanish monarch and the sister of the Holy Roman Emperor, Charles V. Charles in turn, as an Elector, controlled the papacy. England had been a Catholic monarchy for nearly 500 years, since before 1066 and the Battle of Hastings. Queen Catherine had been unable to bear Henry a son, a male heir to succeed him on the throne. Because Henry feared a repeat of the civil war that broke out when his ancient predecessor, Henry I, died and was succeeded by his daughter Mathilda and her husband

Stephen, he sought an annulment of his marriage from the Pope. But pressure from Charles V and the Spanish throne prevented the Pope from acquiescing. Henry thus sought to use English law, which had no such authority or precedent, to obtain a divorce from Catherine. In this endeavor he needed the support of his Chancellor. Thomas More felt himself obligated by law to oppose his king. At a number of stages in the long affair, Henry gave Thomas opportunities to make subtle if unprecedented distinctions and thereby support him. More refused to compromise his understanding of the law and paid with his life on a charge of treason. At every stage in the proceeding Thomas More insisted on following the law as it was generally understood, even when equivocation would have saved his life.

The most important scene in Bolt's play eloquently portrays More's dedication to the rule of law. His wife and daughter urge him to use his office to have a man who represents some danger to him charged with a crime and arrested. His son-in-law, Roper, argues that God's law would condemn the man—to which More responds then let God arrest him. Roper calls that a sophistication, but More replies: "No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal."

More explains that the man should remain free until he has broken the law, even if he were the Devil himself. Whereupon his son-in-law protests that he would cut down every law in England to get after the Devil. It is then in reply that More articulates, in one of the play's magnificent passages, the great justification for the rule of law:

And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat. This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

To my ear there is no more eloquent defense of our system.

One of the principal criticisms of lawyers today is that they will do whatever is expedient. I have often heard a lawyer justify incivility or unprofessional conduct with the expression that it was only right, that it would be very unfair for the client not to prevail. It is precisely that attitude that More rejects in this scene. The mere fact that you represent one of the sides in a dispute cannot possibly equip you to *know* where justice truly lies in a given case. What you do know, however, what you have been trained to know, is the *law*—not what is the *right* outcome for the parties. For the sake

of our profession, we simply must return in our daily work habits to that kind of scrupulous compliance with the law, the ethics, and the canons of our profession that this passage vividly demonstrates.

Recalling the popular perception of lawyers, especially media lawyers, we simply must resolve to free our advocacy from invective. It does no good to mount a personal attack on the other party or lawyer at trial. Judges will be turned off by it and begin casting around for legally sufficient reasons to rule against you. In spite of what you see on television, the art of persuasion does not consist of painting other people in the dispute in the worst possible light. On the contrary, the civil lawyer will instead present the case with a generous tolerance for the other side's motives, presentation and positions.

Do not become like one of the talking heads on Katie or Geraldo or Cokie. Do not ascribe the worst motives to your adversary. If the other side has misrepresented the record or a case, tell the judge that you *understand* the record to show whatever it is you contend that it shows, or the case to hold whatever you think it does. Do not cast every misstatement as a lie. In fact do not generally use that term to describe anything but what the evidence as resolved by the trier of fact has obviously done. If your version is diametrically opposed to that represented by your adversary, and upon review you turn out to be correct and your adversary wrong, you will not have done better for yourself and worse for your adversary than all the invective in the world would have done.

Ours is an age of hyperbole. Almost any artist, artisan or athlete is the "greatest." The common inconveniences of modern society are "outrageous" or "tragedies." Every misstatement is a "lie" or a "fraud." Someone, or something, is either the "greatest" or the "worst." Ordinary feats of athletic prowess are routinely described as "awesome." As a society, we are largely unaccustomed to restraint or understatement in expression; exaggeration saturates our spoken and written speech. This too pervades legal discourse. But if you couch everything in the superlative, how indeed do you articulate the truly exceptional when it really does occur? If you continually refer to the routine as "awesome" how indeed will you explain when the truly awesome comes along?

It is time for lawyers in argument to return to the fine art of euphemism, of the gallant understatement. Instead of saying that the opposing lawyer is lying about the facts or a case, say that he or she has perhaps *overlooked* whatever it is that you contend. Instead of presuming that your opponent is intentionally misstating something, affect to indulge every presumption of adversarial good faith and then proceed to demonstrate—in the gentlest terms—by fact, law, or logic how and where your adversary has gone awry. Instead of arguing that something is an insult say, as President Kennedy once did, that it bargains an apple for an orchard. The hardness of the blows that you strike for your cause should in all events abide in the force of their

reason and accuracy, not in the force or color of their invective. Because hyperbole and grand overstatement are pervasive in our society, a gentle understatement may do more to persuade than anything else.

Keep the most civil of tongues, and the civil hand in your written argument. Never, never engage in personal attacks on your opposing lawyer—not even when the opposing lawyer does it to you. Don't do it the first time; don't do it ever. While honest emotion can be effective even in appellate discourse, it should be rare and never directed at another lawyer in the case. And its use against a party should always be supported by clear evidence in the record and be logically related to a legitimate issue actually raised and presented for resolution in the appeal.

Moderate your tone and manner. We have all heard the adage that the surest way to be heard above the din is to whisper. Being wrong in argument is bad but being wrong at the top of your voice is unbearable. As I suggested earlier, from the lawyers on television it seems that all legal argument is at the top of one's voice. Be marked by the softness of a kind civility of your tone and manner. Develop a gentle tongue, and thereby improve your own image.

Never end a case with animosity to opposing counsel. Even when it hurts the most, when you have just suffered the most stinging defeat in your career, go over to the other table and congratulate the opposing lawyer on the good job. Shake her hand; smile, no matter the pain. Do not end that professional transaction with rancor. If, for no other reason, than you simply cannot predict when the other lawyer's good will may be helpful.

The English language is wide and deep and rich enough to make your case zealously without drawing upon the worst in human emotions, without dealing in anger and petulance and abuse. The professional tools are there for you to present every cause well within the law and your ethics. You can be more effective, even with a deference to your adversary. If you examine your own conscience and find that you have something approximating the characteristics of lawyers popularly perceived today, then I strongly urge you to begin the struggle to eliminate them and return to the example of Thomas More.

Come to law as a process, not with the sole purpose of winning every cause, but instead with a strong dedication to the rule of law. Make your client's case in the best way permitted by our law and ethics, but with the civility and personal restraint that marks the best of our profession. Return to the understanding that our professional role is most concerned with the process and with the belief that if we make the best case within the law and ethics, the probability is that the right result will be reached. Come back to law as a process.

Look upon your role as that of a teacher, who will lead the court through the legal thicket. And then, just as Virgil left Dante, leave all legal

proceedings with an air of grace, with an indelible perception of all that is good in legal advocacy. Leave your audience with a lasting impression of your dedication, not to the goal of victory above all else in the trial or hearing, but instead of an abiding deference to the rule of law, to the canons and ethics of professionalism, to the constraints and limits of circumstance and the primary codes of human conduct. Do that and there is a chance that we can erase the current low image of our profession and restore ourselves once again in the minds of fairminded people everywhere that ours is still the profession that gave the world a Thomas More, an Abraham Lincoln, a Louis Brandeis, and Thurgood Marshall.



## Juvenile Law Issues in Florida in 1998

Michael J. Dale\*

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### I. INTRODUCTION

The Florida Legislature withdrew from extensive restructuring of the statutes governing juvenile delinquency during the 1998 session, making only modest changes to the new chapter, chapter 985, which it introduced in 1997. In the child welfare area, however, the legislature did make more substantial changes, at least in part, in response to the passage of new federal legislation governing abuse and neglect matters.

In the appellate courts, there was substantial activity, albeit generally technical in nature. There were, however, several significant opinions by the

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Supreme Court of Florida, although they too were of a technical nature. The appellate courts continue their periodic commentary expressing concern with the failure of the trial courts to comply with rudimentary statutory obligations.

## II. DEPENDENCY

### A. Adjudicatory Issues

Admission of out of court statements by child victims in dependency proceedings is an important probative part of such cases. There is a growing body of statutory and case law, nationwide, which deals specifically with out of court statements by youngsters and the development of special hearsay exceptions.<sup>1</sup> In Florida, section 90.803(23) of the *Florida Statutes* governs hearsay exceptions for the statement of the child/victim.<sup>2</sup> In *Department of Health & Rehabilitative Services v. M.B.*,<sup>3</sup> the Supreme Court of Florida had before it an appeal raising the question of whether a child/victim's prior unsworn statement, which was inconsistent with the child's in court testimony, was admissible where the testimony supported a determination that the earlier unsworn statement met sufficient safeguards of reliability.<sup>4</sup> The statute in question provides that the court must find that there are sufficient safeguards of reliability in the child's statement and shall take into account the child's mental and physical age and maturity, nature and duration of the abuse or offense, the relationship of the child to the offender, reliability of the assertion, reliability of the child/victim, and any other factors deemed appropriate.<sup>5</sup> The court found that section 90.803(23) of the *Florida Statutes* permits a child/victim's prior inconsistent statements to be admitted as substantive evidence if found to be trustworthy.<sup>6</sup> The court held that the child's out of court statements could be admitted into evidence, without the necessity that they be consistent with the child's trial testimony, so long as strict standards of reliability are applied before admitting the statements.<sup>7</sup> In addition, the court held that the applicable evidentiary standard in such a case is a preponderance of the evidence, or greater weight

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1. See generally MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT, ¶ 7.06 (Matthew Bender 1998).

2. FLA. STAT. § 90.803(23) (Supp. 1998).

3. 701 So. 2d 1155 (Fla. 1997).

4. *Id.* at 1156.

5. FLA. STAT. § 90.803(23) (Supp. 1998).

6. *M.B.*, 701 So. 2d at 1162.

7. *Id.*

of the evidence, since the proceeding is that of a civil dependency matter nature.<sup>8</sup>

Under Florida law, a parent who voluntarily executes a written surrender of the child, and consents to the entry of order giving custody of the child to the state or an agency, for purposes of adoption, may only withdraw the consent, after acceptance of the child by the Department or licensed child care agency, upon a finding that the surrender and consent were obtained by fraud or duress.<sup>9</sup> In *Bailey v. Department of Health & Rehabilitative Services*,<sup>10</sup> the issue raised was whether a parent could withdraw consent to a dependency petition.<sup>11</sup> In a split opinion, the appeals court held that absent a showing of fraud or duress, the consent could not be withdrawn in a dependency proceeding.<sup>12</sup> In dissent, Judge Sharp argued first that the lower court order contained none of the findings as to the voluntariness and full understanding of the consent required in a termination case.<sup>13</sup> Second, he argued that *Interest of I.B.J.*,<sup>14</sup> which held that it was not necessary to show fraud or duress in order to withdraw valid consent in a dependency proceeding, was still valid.<sup>15</sup> Instead, he relied upon Rule 8.315(b) of the *Florida Rules of Juvenile Procedure*, which provides that at any time prior to the beginning of a disposition hearing the court may permit an admission of the allegations of the petition to be withdrawn and, if an adjudication has been entered, it may be set aside.<sup>16</sup> Thus, in Judge Sharp's view, the court had discretion to set aside the consent.<sup>17</sup>

In 1991, in *Padget v. Department of Health & Rehabilitative Services*,<sup>18</sup> the Supreme Court of Florida held that parental rights may be terminated if the court finds that the child is at substantial risk of imminent abuse or neglect by the parent, and this finding is based on proof of neglect or abuse of other children if the evidence shows a substantial risk that the child will suffer similar abuse.<sup>19</sup> In 1998, in *Eddy v. Department of Children & Family*

8. *Id.* at 1163.

9. FLA. STAT. § 39.806(1)(d)2 (Supp. 1998).

10. 703 So. 2d 1224 (Fla. 5th Dist. Ct. App. 1998).

11. *Id.* at 1225.

12. *Id.*

13. *Id.* (Sharp, J., dissenting).

14. 497 So. 2d 1265 (Fla. 5th Dist. Ct. App. 1986).

15. *Bailey*, 703 So. 2d at 1226 (Sharp, J., dissenting).

16. *Id.*

17. *Id.*

18. 577 So. 2d 565 (Fla. 1991).

19. *Id.* at 566. See also, Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Juvenile Law*, 16 NOVA L. REV. 333, 368–373 (1991) [hereinafter 1991 Survey]; Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189, 216–17 (1996) [hereinafter 1996 Survey].

*Services*,<sup>20</sup> an unmarried father was charged with dependency on the basis of a ten year old criminal adjudication for sexual abuse of nephews when he was between thirteen and sixteen years of age.<sup>21</sup> The Fifth District Court of Appeal held that prior sexual abuse of other children is insufficient alone to establish a substantial risk of imminent abuse; there must be independent evidence showing that sexual abuse is likely to recur.<sup>22</sup> For example, independent evidence in the form of "testimony from a mental health specialist that the parent or custodian suffers from an untreatable problem would provide the nexus between the prior abuse and the allegation of prospective abuse."<sup>23</sup> Here, there was no nexus, and the court reversed the adjudication of dependency.<sup>24</sup>

In *S.J. v. Department of Health & Rehabilitative Services*,<sup>25</sup> a mother petitioned for certiorari review of two post-dependency decisions challenging, *inter alia*, an amended order in which the court applied a best interests of the child standard in the determination to remove a child previously adjudicated dependent from the mother's home and to place the child with an adult relative.<sup>26</sup> The appellate court reversed, finding that the circuit court had applied an erroneous standard in removing the child from the mother's care and custody and placing the child in long term relative placement, without adherence to the statutory requirements.<sup>27</sup> The statutory authorization for post-disposition placement is found in section 39.508(9)(a)8.b. of the *Florida Statutes*.<sup>28</sup> The appellate court held that there is no authority to deviate from the statutory requirement, which states that the test is endangerment of the safety and well being of the child.<sup>29</sup> There is no statutory provision for independent judicial consideration of the best interests of the child.<sup>30</sup> The Department had the burden to show that the

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20. 704 So. 2d 734 (Fla. 5th Dist. Ct. App. 1998).

21. *Id.* at 735.

22. *Id.* at 736.

23. *Id.*

24. *Id.*

25. 700 So. 2d 71 (Fla. 1st Dist. Ct. App. 1997).

26. *Id.* at 72.

27. *Id.* at 73.

28. FLA. STAT. § 39.508(9)(a)8.b. (Supp. 1998). The relevant section states:

In cases where the issue before the court is whether a child should be reunited with a parent, the court shall determine whether the parent has substantially complied with the terms of the case plan to the extent that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the return of the child to the home.

*Id.*

29. *S.J.*, 700 So. 2d at 75.

30. *Id.*

child's safety was endangered by remaining in her mother's home.<sup>31</sup> The court concluded that while the best interests of the child is an overriding concern in all chapter 39 proceedings, there is no legislative authorization for using a best interests of the child legal standard to determine a change in placement of a dependent child.<sup>32</sup>

As prior survey articles in this law review have discussed, the appellate courts have regularly admonished the trial courts in both dependency and delinquency cases for repeated failures to comply clear mandatory statutes.<sup>33</sup> A particularly egregious example of the appellate courts' reluctant but clear exposition of concern is *Ritter v. Department of Children & Family Services*.<sup>34</sup> *Ritter* involved a writ of mandamus to compel the trial court to issue a ruling in a case in which it had delayed almost twenty-seven months between the day of the dependency hearing, and the rendering of the order declaring the children dependent.<sup>35</sup> The appellate court advanced that the reason for the delay was not explained in the record.<sup>36</sup> The court then stated, "[w]e find this case falls within that class of cases in which trial courts have been sternly admonished for unnecessarily impeding the prompt administration of justice, especially in matters involving child custody."<sup>37</sup> The court added, that it found that the delay of nearly twenty-seven months in the case, coupled with the proceeding for mandamus brought by one of the parties, "casts sufficient doubt upon the wisdom and fairness of the decisions rendered by the trial judge to require that all of the orders in this matter be vacated and that a new evidentiary hearing be conducted forthwith."<sup>38</sup> The court then suggested that the case be assigned to another judge.<sup>39</sup> Judge Harris concurred, adding that there should be a bright line standard beyond which a delayed judgment simply would not be recognized.<sup>40</sup>

An important issue in the area of dependency is what happens to children who have been adjudicated dependent and placed into state care when they reach the age of eighteen. This issue was raised in *L.Y. v. Department of Health & Rehabilitative Services*.<sup>41</sup> Specifically, the issue in *L.Y.* was whether the court could dismiss a dependency case and terminate

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31. *Id.*

32. *Id.* at 74.

33. See Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 140 (1994) [hereinafter *1994 Survey*].

34. 700 So. 2d 804, 805 (Fla. 5th Dist. Ct. App. 1997).

35. *Id.* at 804-05.

36. *Id.* at 805.

37. *Id.* (citations omitted).

38. *Id.*

39. *Ritter*, 700 So. 2d at 805.

40. *Id.* at 806 (Harris J., concurring).

41. 696 So. 2d 430 (Fla. 4th Dist. Ct. App. 1997).

juvenile court jurisdiction over a child when she reached eighteen, although she continued to receive services from the Department.<sup>42</sup> The appellate court affirmed, without prejudice to the appellant's right to seek appointment of a guardian pursuant to chapter 744 of the *Florida Statutes* if there was a showing of incapacity.<sup>43</sup> The court explained that the issue was a legislative one and not a judicial one.<sup>44</sup> As the court put it:

Unfortunately for *L.Y.*, the fight is in the wrong arena as the legislature has not provided for judicial review of these services still being rendered to a now 18 year old, previously determined to be dependent, when that individual may not be incapacitated. The conscientious, concerned trial court properly held that the laws of Florida currently do not permit retention of continuing juvenile jurisdiction and review until the individual is 21.<sup>45</sup>

### B. *Guardian Ad Litem Issues*

Because Florida is a participant in the Federal Child Abuse Prevention and Treatment Act of 1974 ("CAPTA"), the state is obligated to provide a guardian ad litem for a child in dependency proceedings.<sup>46</sup> The operation of this program is governed by statutes, court rules, unpublished supreme court orders, and case law.<sup>47</sup> In cursory opinions devoid of statutory analysis, the Florida courts have rejected claims that the failure to have a guardian ad litem in place in the proceeding has been a fundamental error, on a number of occasions over the past few years.<sup>48</sup> In *W.R. v. Department of Children & Family Services*,<sup>49</sup> the Fourth District Court of Appeals continued this trend, and reaffirmed the proposition that the absence of an active guardian ad litem does not preclude a trial court from adjudicating children dependent.<sup>50</sup>

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42. *Id.* at 431.

43. *Id.*

44. *Id.*

45. *Id.* (commenting that the California Legislature has authorized such jurisdictions under the California Welfare and Institution Code, § 303. CAL. WELFARE & INST. § 303 (1998)).

46. See 42 U.S.C. § 5105 (1998).

47. See generally 1996 Survey, *supra*, note 19, at 222.

48. *Id.*

49. 701 So. 2d 651 (Fla. 4th Dist. Ct. App. 1997).

50. *Id.* at 652. Ironically, the trial court held that it could not conclude that the grounds for the termination of parental rights were established by clear and convincing evidence because the absence of an active guardian was fundamental and an impairment of the ability to make the finding. *Id.*

This line of cases is particularly disturbing because a child has no right to counsel in a dependency proceeding in Florida.<sup>51</sup>

### III. TERMINATION OF PARENTAL RIGHTS

#### A. Adjudicatory Issues

The Florida courts have regularly analyzed the test for termination of parental rights, the grounds for which are articulated in section 39.464 of the *Florida Statutes*.<sup>52</sup> This statute also provides that in a hearing on a petition for termination of parental rights, the court shall consider the manifest best interests of the child.<sup>53</sup> In *Department of Children & Family Services v. J.A.*,<sup>54</sup> a case of apparent first impression, the Department appealed on the ground that the court failed to make a best interest finding, even after the state failed to prove grounds to terminate under section 39.464 of the *Florida Statutes*.<sup>55</sup> The appellate court recognized that terminations must be based upon both provisions.<sup>56</sup> However, it concluded that even if the statute required a best interest finding in every case, including those where termination was rejected, the court's failure to do so would be harmless error and would not affect the ultimate denial of the petition.<sup>57</sup>

Application of the *Padgett v. Department of Health & Rehabilitative Services*<sup>58</sup> standard also came up recently in a termination of parental rights case, *Gaines v. Department of Children & Families*.<sup>59</sup> The issue was one of "prospective" abuse or neglect. The court held that there must be a showing in the record that the behavior of the parent was beyond the parent's control, likely to continue, and placed the child, who was the subject of the proceeding, at risk.<sup>60</sup> In the case at bar, there was no showing between the prior abuse of siblings, and the allegation of prospective abuse against the child who was the subject of the proceeding.<sup>61</sup>

Confidentiality is a significant issue in both dependency and termination of parental rights cases in Florida. Section 39.471 of the *Florida*

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51. *In re D.B. & D.S.*, 385 So. 2d 83 (Fla. 1980).

52. FLA. STAT. § 39.464 (Supp. 1998).

53. FLA. STAT. § 39.4612 (1997).

54. 701 So. 2d 657 (Fla. 4th Dist. Ct. App. 1997).

55. *Id.* at 658–59.

56. *Id.* at 659.

57. *Id.*

58. 577 So. 2d 565 (Fla. 1991).

59. 711 So. 2d 190 (Fla. 5th Dist. Ct. App. 1998).

60. *Id.* at 193.

61. *Id.* at 194.

*Statutes* governs confidentiality in termination cases and provides that all information obtained by judges, employees of the court, authorized agents of the Department of Children and Family Services ("DCFS"), and law enforcement agents shall be kept confidential unless authorized by the court.<sup>62</sup> *Stanfield v. Department of Children & Families*,<sup>63</sup> involved an appeal by the adult half-sister of the children before the court in a termination case.<sup>64</sup> She challenged an injunctive order enjoining her from disclosing information about the case to the media or other persons.<sup>65</sup> The appeals court held that the statutory authority to limit persons from discussing or talking about what they learned from sources other than court documents does not allow for an injunction.<sup>66</sup> "The court cannot prohibit citizens from exercising their First Amendment right to publicly discuss knowledge that they have gained independent of court documents even though the information may mirror the information contained in court documents."<sup>67</sup> The court also indicated that it could enjoin lawyers from discussing the proceedings.<sup>68</sup>

#### B. *Right to Counsel Issues*

In *J.B. v. Department of Children & Family Services*,<sup>69</sup> a father appealed from a court order denying him counsel in a termination of parental rights proceeding on the ground that he had not previously appeared and was therefore deemed to have consented to termination of his parental rights.<sup>70</sup> The appellate court reversed, finding that the failure to advise the father of his right to counsel at the adjudicatory hearing, coupled with the failure to continue the adjudicatory hearing for the purposes of allowing the father an opportunity to obtain counsel, warranted reversal under the then applicable provisions of chapter 39 of the *Florida Statutes* for appointment of counsel in termination cases.<sup>71</sup> The failure to advise occurred after the advisory hearing, at which the father did not appear.<sup>72</sup> The court recognized that the case should be remanded, to allow the parent an opportunity to appear with

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62. FLA. STAT. § 39.471 (Supp. 1998).

63. 698 So. 2d 321 (Fla. 3d Dist. Ct. App. 1997).

64. *Id.* at 321.

65. *Id.*

66. *Id.* at 323.

67. *Id.*

68. *Stanfield*, 698 So. 2d at 323.

69. 703 So. 2d 1208 (Fla. 1st Dist. Ct. App. 1997).

70. *Id.* at 1209.

71. *Id.* at 1210; FLA. STAT. §§ 39.465(1)(a), 1(b)(3) (1997) and FLA. STAT. § 39.467(2) (1997).

72. *J.B.*, 703 So. 2d at 1210.



the assistance of counsel to challenge the consent to termination of parental rights by default, and to present evidence at the adjudicatory hearing.<sup>73</sup> Chapter 39 was amended during the last legislative session to require appointment of counsel to all parents in dependency cases.<sup>74</sup>

A minor mother appealed from an order terminating her parental rights on the ground that without counsel she signed a surrender and consent, giving the child to the Department of Health and Rehabilitative Services for subsequent adoption.<sup>75</sup> In *J.E.F.L. v. Department of Health & Rehabilitative Services*,<sup>76</sup> the mother who, after executing a voluntary surrender, was appointed counsel, sought a continuance of the final adjudicatory hearing so that she could attend the hearing and contest termination.<sup>77</sup> However, she was unable to do so because she could not find transportation.<sup>78</sup> The trial court denied the motion and the appeal ensued.<sup>79</sup> The appellate court found that this was the only opportunity to challenge the conditions under which the minor mother executed the voluntary surrender, the grounds for which would be fraud or duress.<sup>80</sup> In addition, the court held that the validity of the waiver of counsel in order to sign the voluntary termination would also be at issue before the court.<sup>81</sup> The court reversed and remanded so that, with appointed counsel the minor could show fraud or duress in the execution of the surrender.<sup>82</sup>

### C. Appellate Issues

In *G.L.S. v. Department of Children & Families*,<sup>83</sup> the Supreme Court of Florida resolved the conflict between the districts on the question of whether, in a child dependency proceeding, an adjudication order which terminates parental rights is immediately appealable as a final order or reviewable only upon appeal from the disposition order.<sup>84</sup> The first district, in *G.L.S.*,<sup>85</sup> held that it was,<sup>86</sup> whereas the Fifth District Court of Appeal in

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73. *Id.*

74. *See infra* Part IV.

75. *J.E.F.L. v. Department of Health & Rehabilitative Servs.*, 700 So. 2d 3, 4 (Fla. 1st Dist. Ct. App. 1997).

76. *Id.* at 3.

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *J.E.F.L.*, 700 So. 2d at 4..

81. *Id.*

82. *Id.* at 4–5.

83. 724 So. 2d 1181 (Fla. 1998).

84. *Id.* at 1182.

85. 700 So. 2d 96 (Fla. 1st Dist. Ct. App. 1997).

*Moore v. Department of Health & Rehabilitative Services*<sup>87</sup> and *Lewis v. Department of Health & Rehabilitative Services*,<sup>88</sup> held "that it is the second or dispositional order which is the final order for purposes of appeal."<sup>89</sup> The Supreme Court of Florida held "that the First District erred in holding that an adjudication order which initially terminates parental rights in a child dependency case may not be challenged upon appeal from a subsequent disposition order."<sup>90</sup>

#### IV. STATUTORY CHANGES INVOLVING DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

The Florida Legislature made a number of changes in 1997 that effect dependency and termination of parental rights proceedings. Perhaps in an effort to integrate child abuse and neglect legislation with chapter 39, the legislature inserted many child protection provisions from chapter 415 into chapter 39.<sup>91</sup>

The legislature made a dramatic change in the dependency field by amending section 39.013 of the *Florida Statutes*, to provide that indigent parents must be appointed counsel at the dependency stage of the proceedings.<sup>92</sup> The change is significant in a number of respects. As a constitutional matter, the case goes beyond the holding of the United States Supreme Court in *Lassiter v. Department of Social Services*,<sup>93</sup> in which the high court said that there was no absolute right to counsel under the Due Process Clause of the Fourteenth Amendment in termination of parental rights cases.<sup>94</sup> As a practical matter, the Florida Legislature now provides parents with a protection that should ease the appellate docket, which in past years contained many appeals from termination of parental rights because, under the old law, the lack of counsel at the dependency stage rendered the

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86. *Id.* at 99.

87. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).

88. 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996).

89. *Moore*, 664 So. 2d at 1139.

90. *G.L.S.*, 724 So. 2d at 1182.

91. FLA. STAT. § 39.001 (6)–(8) (Supp. 1998) (former § 415.501 (1997)); FLA. STAT. § 39.0015 (Supp. 1998) (former § 415.5015 (1997)); FLA. STAT. § 39.201 (Supp. 1998) (former § 415.504 (1997)); FLA. STAT. § 39.203 (Supp. 1998) (former § 415.511 (1997)); FLA. STAT. § 39.204 (Supp. 1998) (former § 415.512 (1997)); FLA. STAT. § 39.205 (Supp. 1998) (former § 415.513 (1997)); FLA. STAT. § 39.303 (Supp. 1998) (former § 415.5055 (1997)); FLA. STAT. § 39.304 (Supp. 1998) (former § 415.507 (1997)); FLA. STAT. § 39.305 (Supp. 1998) (former § 415.5095 (1997)); FLA. STAT. § 39.307 (Supp. 1998) (former § 415.50171 (1997)).

92. See FLA. STAT. § 39.013(1), (8)–(10) (Supp. 1998).

93. 452 U.S. 18 (1981). See also DALE, ET AL., *supra* note 1 at ¶ 7 (discussing *Lassiter*).

94. *Lassiter*, 452 U.S. at 25–27.

finding of termination of parental rights invalid.<sup>95</sup> The failure to provide free counsel to indigent parents in dependency cases under the old law was the subject of discussion in this survey on numerous occasions.<sup>96</sup> Under the new statute, the compensation scheme of attorneys representing indigent parents in dependency proceedings shall be established by each county.<sup>97</sup> The compensation scheme in termination of parent rights cases is a maximum of \$1,000 at the trial level and \$2,500 at the appellate level.<sup>98</sup>

As a matter of case review, and in compliance with the changes in the CAPTA, section 39.710 of the *Florida Statutes* was amended to provide that when the court extends any case plan beyond twelve months, rather than eighteen months under the prior law, judicial reviews must be held at least every six months.<sup>99</sup> In the area of termination of parental rights, the legislature also amended chapter 39 of the *Florida Statutes* to contain a much more detailed procedure for the identification and location of unknown parents after the filing of a termination of parental rights petition.<sup>100</sup> The diligent search requirement should help in situations where a parent subsequently comes forward to challenge the termination of parental rights.<sup>101</sup>

The legislature also changed the provisions governing injunctions pending disposition of a petition in a dependency proceeding, to effectively provide for *ex parte* injunctions where the child is reported to be in imminent danger.<sup>102</sup> Under such circumstances, notice to the parties as provided by Rule 8.305 of the *Florida Rules of Juvenile Procedure* may be waived.<sup>103</sup> However, when an immediate injunction is issued, the court shall hold a hearing on the next day of judicial business either to dissolve the injunction, or to continue or modify it.<sup>104</sup>

Section 39.501 of the *Florida Statutes* was amended to include a new sub-part four which now provides that with regard to the petition for dependency, the child's parent, guardian, or custodian must be served with a

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95. See Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 209–10 (1997) [hereinafter *1997 Survey*].

96. *Id.* at 209; *1996 Survey*, *supra* note 19, at 218; *1994 Survey*, *supra* note 33, at 146.

97. See FLA. STAT. § 39.0134(1) (Supp. 1998).

98. See *id.* § 39.0134(2).

99. See also *id.* § 39.703(2).

100. Ch. 98-403, § 85, 1998 Fla. Laws 3081, 3201 (codified at FLA. STAT. § 39.803 (Supp. 1998)).

101. FLA. STAT. § 39.803(5)–(8) (Supp. 1998).

102. Ch. 98-403, § 65, 1998 Fla. Laws 3081, 3165–66 (codified at FLA. STAT. § 39.504(2) (Supp. 1998)).

103. FLA. R. JUV. P. 8.305.

104. FLA. STAT. § 39.504(2) (Supp. 1998).

copy of the petition at least seventy-two hours before the arraignment hearing.<sup>105</sup>

The Florida Legislature made a specific and provocative change in the provisions of chapter 39, governing the activities of the guardian ad litem, at section 39.807 of the *Florida Statutes*.<sup>106</sup> It removed a section of that law which previously provided that the court order a guardian ad litem to perform other duties and undertake other responsibilities such as the court may direct.<sup>107</sup>

The legislature amended the section of the dependency statute governing abandonment based upon imprisonment<sup>108</sup> to provide that a parent who is incarcerated in a state or federal correctional institution may be found to have abandoned a child when "[t]he period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years."<sup>109</sup>

The legislature passed a new section of chapter 39 of the *Florida Statutes* dealing with protective investigations of institutional child abuse, abandonment, or neglect.<sup>110</sup> Section 39.302 of the *Florida Statutes* is a very important addition to the statutory scheme, containing a rather detailed investigation procedure including a notification system to the state attorney for criminal investigation.<sup>111</sup> The law provides for restricted access of individuals to the child if there is threatened harm to the youngster.<sup>112</sup>

The legislature also made amendments at various places in chapter 39, to include abandonment together with abuse and neglect as dependency grounds.<sup>113</sup> Oddly, at diverse places in the statute the terms abuse and neglect are found, but abandonment is not when the reference is to the forms of dependency. The legislature also focused on the specific setting of the placement of a child in an independent living arrangement when the youngster is sixteen years of age or older.<sup>114</sup> The legislature mandated continuing court review.<sup>115</sup>

105. FLA. STAT. § 39.501(4) (Supp. 1998).

106. FLA. STAT. § 39.807 (Supp. 1998).

107. See FLA. STAT. § 39.465(b)4. (1997) (recodified at § 39.807(b) (Supp. 1998)).

108. Ch. 98-417, § 2, 1998 Fla. Laws 3332, 3336-7 (codified at FLA. STAT. § 39.806 (Supp. 1998)).

109. FLA. STAT. § 39.806(1)(d)1 (Supp. 1998).

110. FLA. STAT. § 39.302 (Supp. 1998).

111. *Id.*

112. *Id.* at (2)(a).

113. See generally FLA. STAT. § 39.01 (Supp. 1998).

114. FLA. STAT. § 39.508(9)(a)6.e. (Supp. 1998).

115. *Id.*

## V. CHILDREN IN NEED OF SERVICES/FAMILIES IN NEED OF SERVICES

The Florida courts have rarely rendered opinions interpreting the Children in Need of Services/Families in Need of Services ("CINS/FINS") statute<sup>116</sup> which has been in place for ten years.<sup>117</sup> The statute provides for services to children and families focused on counseling and medical, psychiatric and psychological services.<sup>118</sup> In *Department of Juvenile Justice v. C.M.*,<sup>119</sup> the question before the court was whether the trial court could order payment by the Department of Juvenile Justice ("DJJ") to a hospital to which the child was placed for assessment purposes.<sup>120</sup> The court held that it could find no case on point authorizing the court to order payment of expenses in CINS/FINS proceedings.<sup>121</sup> It held that DJJ showed at the trial level that "it had no appropriated funds to pay for [the] expense[s]."<sup>122</sup> The court concluded that the order interfered with both legislative discretion in determining what funds are required of an agency and executive discretion in spending the appropriated funds under the doctrine of separation of powers.<sup>123</sup>

## VI. DELINQUENCY

### A. Detention Issues

Florida's detention statute provides for both secure and nonsecure detention and for both pre- and post-adjudication and disposition detention.<sup>124</sup> All determinations and court orders concerning placement into detention are based upon a risk assessment instrument ("RAI") developed by DJJ.<sup>125</sup> Application of the instrument has generated a substantial amount of appellate law.<sup>126</sup>

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116. FLA. STAT. §984.04 (1997).

117. See 1995 Survey *supra* note 109, at 219, 221.

118. FLA. STAT. § 984.04 (1997). For a discussion of recent changes in the CINS/FINS statute, see 1997 Survey, *supra* note 95, at 205–06.

119. 704 So. 2d 1123 (Fla. 4th Dist. Ct. App. 1998).

120. *Id.* at 1125.

121. *Id.*

122. *Id.*

123. *Id.*

124. See FLA. STAT. § 985.213 (Supp. 1998).

125. *Id.* at (2)(a), (b)1.

126. See 1997 Survey, *supra* note 95, at 181–83.

*N.E.W. v. Portesey*,<sup>127</sup> is a detention case evidencing the appellate courts' ongoing need to clarify the detention law for the trial courts. In *N.E.W.*, the appellate court, on a motion for rehearing, affirmed its opinion granting petitions for writs of habeas corpus for two children who were detained as the result of a policy adopted by DJJ.<sup>128</sup> During the term of community control, the children were charged with new misdemeanor level offenses that did not involve domestic violence and which otherwise would not allow for secure detention.<sup>129</sup> The court rejected the policy adopted by DJJ and endorsed by the juvenile judges presiding over the detention hearings in Hillsborough County finding no statutory foundation for the approach.<sup>130</sup> DJJ had scored earlier third degree felony offenses on its risk assessment instrument, which would have fulfilled the obligations of the state statute had they been new offenses.<sup>131</sup> But, the new offenses were only misdemeanors.<sup>132</sup> Thus, the court concluded that "there [was] no statutory authority to score a delinquent offense that has already been the subject of an adjudicatory hearing when a juvenile is picked up for a new offense."<sup>133</sup>

A child may only be placed in detention after an adjudicatory hearing when newly discovered evidence or changed circumstances are reflected on the amended risk assessment instrument which mandates confinement.<sup>134</sup> In *K.K. v. Taylor*,<sup>135</sup> a child brought a writ of habeas corpus challenging her post-adjudication secure detention.<sup>136</sup> The court held that, "the state elevates the provision of the form to suspend the access of our citizenry to the writ of habeas corpus, a daring proposition born more from reflexive advocacy than reasoned legal thinking."<sup>137</sup> The Court then added that, "[e]ven more alarming than the state's reliance on a sentence from a form to legitimize confinement clearly proscribed by statute is the fact that in the case at bar the language 'must be detained' had not even been checked during the initial preparation of the [risk assessment] form."<sup>138</sup>

The Florida detention statute now provides that when a child is committed to DJJ and awaiting a dispositional placement the child must be

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127. 712 So. 2d 1158 (Fla. 2d Dist. Ct. App. 1998).

128. *Id.* at 1159.

129. *Id.*

130. *Id.*

131. *Id.*

132. *N.E.W.*, 712 So. 2d at 1159.

133. *Id.*

134. *See S.W. v. Woolsey*, 673 So. 2d 152, 154 (Fla. 1st Dist. Ct. App. 1996).

135. 703 So. 2d 1064 (Fla. 2d Dist. Ct. App. 1997).

136. *Id.*

137. *Id.* at 1065.

138. *Id.* The court granted the writ because the statute forbid detention of the child. *Id.*

removed from the detention center within five days of the commitment.<sup>139</sup> However, where a child is committed to a lower moderate risk residential program, DJJ may apply for an order from the court for continued detention for a maximum of fifteen days excluding weekends and legal holidays for the purpose of finding an appropriate facility.<sup>140</sup> In *A.W. v. State*,<sup>141</sup> and *J.M. v. State*,<sup>142</sup> the child sought a writ of habeas corpus on the ground that the court on its own motion had ordered the child to remain in secure detention for ten<sup>143</sup> and fifteen<sup>144</sup> days respectively, while awaiting placement. The appeals courts held that the trial court could only extend the detention beyond the five days pending placement in a moderate risk facility if the Department applied to the court and demonstrated that it was necessary for placement purposes.<sup>145</sup> The extensions were not for purposes of maximizing punishment.<sup>146</sup> The appellate courts reversed.<sup>147</sup>

Another use of detention in Florida is for the placement of juveniles who are held in direct or indirect contempt. Section 985.216(2)(a) of the *Florida Statutes* provides that a juvenile may be held in a secure detention facility for five days for a first offense or for fifteen days for a second or subsequent offense.<sup>148</sup> In *G.S. v. State*,<sup>149</sup> juveniles in four consolidated cases appealed from their placement in secure detention pursuant to contempt findings arguing that the community control statute states that violations of community control require placement in a "consequence unit."<sup>150</sup> The consequence unit is a term introduced in the 1997 amendments to the *Florida Juvenile Code*, but without definition.<sup>151</sup> According to the appeals court in *G.S.*, DJJ has not implemented the amendment.<sup>152</sup> Nor, according to the court, did it appear that the statute mandated the creation of such units, and it further concluded that no funds were appropriated for the construction of such units.<sup>153</sup> The court therefore held that under those circumstances it was hesitant to say that the juvenile detention center cannot

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139. Fla. Stat. § 985.215(10)(a)1. (Supp. 1998).

140. *Id.*

141. 711 So. 2d 598 (Fla. 5th Dist. Ct. App. 1998).

142. 705 So. 2d 98 (Fla. 5th Dist. Ct. App. 1998).

143. *A.W.*, 711 So. 2d at 599.

144. *J.M.*, 705 So. 2d at 99.

145. *Id.*; *A.W.*, 711 So. 2d at 599.

146. *Id.*

147. *Id.*

148. FLA. STAT. § 985.216(2)(a) (Supp. 1998).

149. 709 So. 2d 122 (Fla. 5th Dist. Ct. App. 1998).

150. See FLA. STAT. § 985.231(1)(a)1.c.(I) (Supp. 1998).

151. *Id.*

152. *G.S.*, 709 So. 2d at 123.

153. *Id.*

serve as a consequence unit for juveniles who violate community control or aftercare.<sup>154</sup> The court concluded that “[c]ontempt appears to be an *alternative* permissible procedure to address juvenile violators of community control.”<sup>155</sup> It noted that the legislature had passed section 985.216(1) of the *Florida Statutes* to obviate the Supreme Court of Florida’s ruling in *A.A. v. Rolle*,<sup>156</sup> which had held that the court could not use secure detention to punish juveniles for contempt of court.<sup>157</sup> The court concluded in *G.S.* that the contempt procedure is a free standing separate provision of the law, distinct from the violation procedures and remedies under community control.<sup>158</sup> Thus, while the juveniles in the case at bar had not been charged with violating community control, they were held to have been in contempt of court.<sup>159</sup> The appeals court thus affirmed the placement in secure detention.<sup>160</sup>

### B. *Adjudicatory Issues*

Florida’s speedy trial rule in juvenile cases provides that the case must be brought to trial within ninety days.<sup>161</sup> The Third District Court of Appeal recently held so in *State v. Meza*,<sup>162</sup> a case in which the trial court discharged a juvenile when the information was filed on the ninetieth day because, in its view, ninety days means ninety days.<sup>163</sup> Relying on an earlier Supreme Court of Florida opinion in *P.S. v. State*,<sup>164</sup> the court held that the state may not file or re-file charges after the ninetieth day of the juvenile speedy trial period but may file on the ninetieth day.<sup>165</sup>

A second case dealing with the speedy trial rule is *P.G. v. State*.<sup>166</sup> After the expiration of the ninety day speedy trial period the state *nolle prossed* a charge of battery against a juvenile.<sup>167</sup> Subsequently, the state filed a new petition charging the child with resisting an officer without violence.<sup>168</sup> The

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154. *Id.*

155. *Id.* at 123–24.

156. 604 So. 2d 813 (Fla. 1992).

157. *Id.* at 818–19.

158. *G.S.*, 709 So. 2d at 124.

159. *Id.*

160. *Id.*

161. FLA. R. JUV. P. 8.090(a).

162. 697 So. 2d 968 (Fla. 3d Dist. Ct. App. 1997).

163. *Id.* at 968.

164. 658 So. 2d 92, 94 (Fla. 1995).

165. *Id.*

166. 711 So. 2d 188 (Fla. 5th Dist. Ct. App. 1998).

167. *Id.* at 189.

168. *Id.*



defense attorney filed a motion for discharge under the speedy trial rule which was denied and the child pleaded with the reservation of a right to appeal.<sup>169</sup> Under Rule 8.090 of the *Florida Rules of Juvenile Procedure*, every child charged with a delinquent act shall be brought to an adjudicatory hearing without demand within ninety days of the earlier of the date the child was taken into custody or the date the petition was filed.<sup>170</sup> The district court of appeals held that the time limitations contained in the rule cannot be avoided by the filing of a *nolle prosequi* by the prosecutor.<sup>171</sup> In the case at bar, the state entered the *nolle prosequi* after the ninety day period had run and there being no requirement that the failure to request a discharge by the child after the initial ninety days had run constitutes a waiver, the government could not reinstitute delinquency proceedings.<sup>172</sup>

Florida has an expansive statute dealing with the transfer of juveniles to adult court which provides for both direct filing and transfer from the juvenile court.<sup>173</sup> In *State v. Davis*,<sup>174</sup> over the state's objections, the trial court in the juvenile division conducted a bond hearing for a custody release after the state had advised the court that the matter was set for arraignment before a judge in the adult felony division.<sup>175</sup> The appeals court held that the lower court departed from its statutory obligation to immediately order that the juvenile be transported to the adult county jail upon the state's announcement that the charges had been direct filed in the adult division where the child would subsequently be booked, processed, and released in the normal course as an adult.<sup>176</sup>

In an important decision, the Supreme Court of Florida recently upheld as constitutional the Florida statutory rape statute<sup>177</sup> as it applied to two fifteen-year-old boys who engaged in consensual sex with two twelve-year-old girls in *J.A.S. v. State*.<sup>178</sup> The court had previously dealt with the question in the context of adults charged with consensual sexual intercourse with persons under the age of sixteen in *B.B. v. State*<sup>179</sup> and *Jones v. State*.<sup>180</sup> In *J.A.S.*, the court upheld the constitutionality of the statute in a consensual

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169. *Id.*

170. *Id.*

171. *P.G.*, 711 So. 2d at 189 (citing *State v. T.W.*, 679 So. 2d 69 (Fla. 4th Dist. Ct. App. 1996)).

172. *Id.* at 189–90.

173. See generally FLA. STAT. § 985 (1997).

174. 699 So. 2d 848 (Fla. 3d Dist. Ct. App. 1997).

175. *Id.* at 848.

176. *Id.* See FLA. STAT. § 985.215(4)(a) (Supp. 1998).

177. FLA. STAT. § 800.04 (1997).

178. 705 So. 2d 1381 (Fla. 1998).

179. 659 So. 2d 256 (Fla. 1995).

180. 640 So. 2d 1084 (Fla. 1994).

setting finding that the state had a compelling interest in intervening to stop sexual misconduct even when consensual.<sup>181</sup> The court also refused to extend the minor's privacy rights which had been established in the abortion context in *In re T.W.*<sup>182</sup> In *B.B.*, the court had found section 794.05 of the *Florida Statutes* unconstitutional as applied to the facts of that case, specifically as both the charged defendant and the alleged consenting victim were age sixteen.<sup>183</sup> The question there was whether the statute which applied to two juveniles in the context of claims of juvenile delinquency involved intimate acts which fell within the zone of privacy recognized by both the United States Constitution and the Florida Constitution under the *T.W.* holding.<sup>184</sup> The court held that it did, specifically distinguishing the adult/minor situation from the minor/minor situation.<sup>185</sup> However, in *J.A.S.*, the court recognized what it viewed as the fundamental distinction that the defendants were two fifteen-year-old boys and the two victims were two twelve-year-old girls, as opposed to all of the youngsters being sixteen-year-olds as in *B.B.*<sup>186</sup> The court concluded in *J.A.S.* that on a balancing of interests, the state's compelling interest in protecting children from harmful sexual conduct outweighed the right of privacy of the defendants.<sup>187</sup> The state had a compelling interest in protecting twelve-year-olds from older teenagers and from their own immaturity in engaging in harmful conduct.<sup>188</sup>

The appellate courts have been faced on a number of occasions with appeals from adjudications of delinquency for disorderly conduct based upon findings that the child used loud, obscene, and/or verbal protests. In *K.S. v. State*,<sup>189</sup> a juvenile appealed from an adjudication based upon a finding that the child cursed at a police officer for what he felt was an unjustified accusation.<sup>190</sup> Relying on a long line of cases, the court reversed, holding that the child's words did not inflict injury or constitute intent to incite an immediate breach of the peace.<sup>191</sup> On the other hand, in *K.A.C. v. State*,<sup>192</sup> the court upheld the adjudication for resisting an officer without

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181. *J.A.S.*, 705 So. 2d at 1383.

182. *Id.*; 551 So. 2d 1186 (Fla. 1989).

183. *B.B.*, 659 So. 2d at 260. *See also 1995 Survey supra* note 109, at 197-98.

184. *Id.* at 258.

185. *Id.* at 259.

186. *J.A.S.*, 705 So. 2d at 1383-85.

187. *Id.* at 1386.

188. *Id.*

189. 697 So. 2d 1275 (Fla. 3d Dist. Ct. App. 1997).

190. *Id.* at 1276.

191. *Id.* *See also* *H.K. v. State*, 711 So. 2d 173 (Fla. 3d Dist. Ct. App. 1998); *L.A.T. v. State*, 650 So. 2d 214 (Fla. 3d Dist. Ct. App. 1995); *Livingston v. State*, 610 So. 2d 696 (Fla. 3d Dist. Ct. App. 1992).

192. 707 So. 2d 1175 (Fla. 3d Dist. Ct. App. 1998).

violence because the essence of the offense was the refusal to respond to questions that officers had a right to ask as opposed to, as in prior cases, a charge based upon what the youth said in the form of loud profanity directed at the police.<sup>193</sup>

The appeals courts have made clear that when multiple offenses constitute the basis for a delinquency adjudication, separate disposition orders for each offense must be used. Nonetheless, the trial courts continually fail to comply with this provision. For example, in *D.A.D. v. State*,<sup>194</sup> the state filed three separate petitions for delinquency against the child.<sup>195</sup> The court used a single commitment order for all three offenses in clear violation of prior case law.<sup>196</sup>

Section 874.03(3) of the *Florida Statutes* provides that in a course of the commission or solicitation of two or more felonies or violent misdemeanors on separate occasions within a three-year period an individual can be declared a member of a criminal street gang.<sup>197</sup> In *S.L. v. State*,<sup>198</sup> a juvenile appealed from the declaration that he was a member of criminal street gang.<sup>199</sup> The appeals court reversed finding that there was no demonstration of a pattern of criminal street gang activity necessary to make the law applicable.<sup>200</sup> The court held that gang membership alone is insufficient to declare a person a member of a criminal street gang.<sup>201</sup> Here, only the gang membership was proven. The officers testified that the juvenile admitted to being a member of the "Latin Lords" and when he was arrested had "Latin Lords" graffiti in his book bag.<sup>202</sup> But there was no showing that the Latin Lords committed, or attempted to commit two or more felonies or violent misdemeanors.<sup>203</sup>

The issue of proper application of *Miranda* warnings in the context of juveniles comes up regularly in Florida appellate case law. This year was no different. In *State v. R.M.*,<sup>204</sup> the state appealed from an order suppressing

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193. *Id.* at 1177 (citing *L.A.T. v. State*, 650 So. 2d 214 (Fla. 3d Dist. Ct. App. 1995); *Livingston v. State*, 610 So. 2d 696 (Fla. 3d Dist. Ct. App. 1992)).

194. 697 So. 2d 234 (Fla. 5th Dist. Ct. App. 1997).

195. *Id.*

196. *Id.* (citing *D.D.M. v. State*, 662 So. 2d 384 (Fla. 5th Dist. Ct. App. 1995); *T.A.R. v. State*, 640 So. 2d 222 (Fla. 5th Dist. Ct. App. 1994)); *see also* *A.V.B. v. State*, 715 So. 2d 954 (Fla. 2d Dist. Ct. App. 1998).

197. FLA. STAT. § 874.03(3) (Supp. 1998).

198. 708 So. 2d 1006 (Fla. 2d Dist. Ct. App. 1998).

199. *Id.* at 1007.

200. *Id.*

201. *Id.* at 1008.

202. *Id.* at 1007.

203. *S.L.*, 708 So. 2d at 1008.

204. 696 So. 2d 449 (Fla. 4th Dist. Ct. App. 1997).

evidence and the appeals court affirmed, applying the Florida rules that the confession must be shown to be voluntary,<sup>205</sup> and the burden is on the state to establish voluntariness by a preponderance of the evidence<sup>206</sup> based upon the totality of the circumstances.<sup>207</sup> In the *R.M.* case, the court upheld the suppression in light of the facts of the case which were described as a fourteen-year-old who had been in a home with a younger sister when the detective arrested her for strong arm robbery.<sup>208</sup> The child was handcuffed, placed in a squad car, and taken to the police station to a brightly lit interrogation room where the detective said it would be in the child's best interests to give a statement because he would go to court and tell the judge that she had been cooperative. The child's mother was not called and the detective did not tell the child that she could have her mother present. The youngster said she talked to the officer because her mother had told her in the past that it was proper to cooperate with people and to be polite to adults.<sup>209</sup>

In juvenile delinquency proceedings certain discovery is permitted under the *Florida Rules of Juvenile Procedure*.<sup>210</sup> The issue before the Third District Court of Appeal in *State v. D.R.*<sup>211</sup> was whether the respondent child, through counsel, could issue a subpoena duces tecum.<sup>212</sup> The State filed a motion for a protective order to quash on the ground that subpoenas duces tecum are not permitted without leave of the court.<sup>213</sup> The appeals court held that the *Florida Rules of Criminal Procedure* governing discovery depositions in criminal matters do not allow such subpoenas without permission of the court and that the *Florida Rules of Juvenile Procedure* governing depositions are identical to the criminal rule.<sup>214</sup> Because the Supreme Court of Florida approved the construction of the criminal rule, the same construction should apply in juvenile court.<sup>215</sup>

A recent enactment dealing with youth crime was the passage in 1994 by Dade County of a Comprehensive Anti-Graffiti Ordinance which made it illegal to sell spray paint cans and broad tipped markers to minors.<sup>216</sup> A

205. *Id.* at 451; see *Coffee v. State*, 6 So. 493, 496 (1889).

206. *State v. Kettering*, 483 So. 2d 97 (Fla. 5th Dist. Ct. App. 1986).

207. See *Frazier v. State*, 107 So. 2d 16 (Fla. 1958).

208. *R.M.*, 696 So. 2d at 451.

209. *Id.*

210. FLA. R. JUV. P. 8.060.

211. 701 So. 2d 120 (Fla. 3d Dist. Ct. App. 1997).

212. *Id.* at 121.

213. *Id.*

214. *Id.*

215. See *Heath v. Beckett*, 327 So. 2d 3 (Fla. 1976) (construing FLA. R. CRIM. P. 3.220 (1976)).

216. DADE COUNTY CODE § 21-30.01 (1994).

minor challenged the constitutionality of the ordinance, which makes it a misdemeanor to have broad-tipped markers or spray paint with the intent to draw graffiti, in *D.P. v. State*.<sup>217</sup> The Third District Court of Appeals upheld the constitutionality of the anti-graffiti ordinance because it did not place an outright ban on the possession of spray paint or jumbo markers by minors and thus, did not violate the juvenile's due process or equal protection rights.<sup>218</sup> Judge Green dissented, finding the ordinance facially unconstitutional as violative of the due process clauses of both the state and federal Constitution.<sup>219</sup>

### C. *Dispositional Issues*

An important form of disposition in Florida delinquency cases is restitution. Trial courts have had difficulty applying the principles of restitution in such cases.<sup>220</sup> In *D.J.R. v. State*,<sup>221</sup> a juvenile was charged with attempted burglary and pleaded to the lesser crime of petit theft.<sup>222</sup> Specifically, he pleaded to cutting an alarm wire at a commercial business.<sup>223</sup> The wire was subsequently repaired and yet six hours later an unrelated burglary and theft occurred at the same business.<sup>224</sup> At that time, the alarm was functioning properly and was triggered.<sup>225</sup> Incredibly, the trial court imposed restitution for items stolen in the burglary the following morning at the same location.<sup>226</sup> The appellate court held that the state may not require the child to pay restitution for damages that were not caused by or related to the child's criminal episode and were not included in the child's plea.<sup>227</sup>

The Florida statutory provisions concerning restitution provide that the amount of restitution may not exceed an amount the child and the parent or guardian may reasonably pay.<sup>228</sup> However, the court has flexibility in fashioning the restitution requirements. In *M.H. v. State*,<sup>229</sup> the court entered

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217. 705 So. 2d 593 (Fla. 3d Dist. Ct. App. 1997).

218. *Id.* at 596-97.

219. *Id.* at 598 (Green, J., dissenting).

220. See 1997 Survey, *supra* note 95, at 199-201; 1995 Survey, *supra* note 109, at 199-200.

221. 701 So. 2d 383 (Fla. 1st Dist. Ct. App. 1997).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *D.J.R.*, 701 So. 2d at 383.

227. *Id.* at 384 (citing FLA. STAT. § 775.089(1)(b)2 (1995)).

228. FLA. STAT. § 985.231(1)(a)1.d.6. (Supp. 1998).

229. 698 So. 2d 395 (Fla. 4th Dist. Ct. App. 1997).

a restitution order liquidating the restitution.<sup>230</sup> As to actual payment, the court held that the child would begin to pay no later than thirty days following either her sixteenth birthday or gaining employment, whichever came first.<sup>231</sup> The court of appeals approved this determination finding that a flexible statutory scheme encourages restitution both to compensate victims and to serve the rehabilitative and deterrent rules of the juvenile justice system.<sup>232</sup> The court added that a reasonable reading of the statute allows the court to revisit the payment schedule issue as the child ages and life skills and earning capacity crystallize.<sup>233</sup>

Restitution orders must also be made in timely fashion. The Supreme Court of Florida has said that restitution may be ordered within sixty days of sentencing although the determination and amount to be paid may be made beyond the sixty day period.<sup>234</sup> In *L.O. v. State*,<sup>235</sup> the court ordered a child to pay \$1,060 in restitution for injuries resulting when the respondent hit a fellow student breaking the student's tooth.<sup>236</sup> While the trial court did not enter a written order of restitution at the time of sentencing or within sixty days thereafter, the appeals court concluded that the trial court put the child and counsel on notice that the juvenile would be responsible for restitution as the trial court made a timely reservation of jurisdiction to award restitution in its oral pronouncement and then some months later set the exact amount to be paid.<sup>237</sup> The court rejected several First District Court of Appeal cases which held that an oral reservation of jurisdiction would be insufficient to satisfy the requirements of the Supreme Court of Florida case law.<sup>238</sup>

An important dispositional issue recently came before the Supreme Court of Florida in *P.W.G. v. State*.<sup>239</sup> The issue was whether the trial court in a delinquency case can order placement in a particular facility, based upon criminal conduct for which the child had not been charged.<sup>240</sup> The child claimed that such a basis for disposition violated his right to substantive due

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230. *Id.* at 396.

231. *Id.*

232. *Id.*

233. *Id.* at 397.

234. *State v. Sanderson*, 625 So. 2d 471 (Fla. 1993).

235. 697 So. 2d 1273 (Fla. 3d Dist. Ct. App. 1997).

236. *Id.*

237. *Id.* at 1275.

238. See *T.W.L. v. State*, 684 So. 2d 844 (Fla. 1st Dist. Ct. App. 1996); *Campbell v. State*, 614 So. 2d 600 (Fla. 1st Dist. Ct. App. 1993); *King v. State*, 611 So. 2d 24 (Fla. 1st Dist. Ct. App. 1992).

239. 702 So. 2d 488 (Fla. 1997).

240. *Id.* at 490.

process of law under both the state and federal constitutions.<sup>241</sup> There had been substantial evidence in the predisposition report of the child's unproven prior sexual abuse and sexual battery of relatives.<sup>242</sup> The pre-disposition report concluded, in light of the child's history, that he could benefit from a treatment program focused upon sexual offenders.<sup>243</sup> But, because such treatment is only available in programs classified as high risk restrictiveness level, the recommendation was that he be committed to the Department at such a level.<sup>244</sup> In light of the distinction between the goal of the juvenile delinquency system and the adult criminal justice system—rehabilitation in the case of the former toward the end of preventing delinquent children from becoming adult offenders—it was constitutionally permissible for the trial court to impose whatever treatment plan it concluded was most likely to be effective for the particular child.<sup>245</sup> This comported with the court's *parens patriae* approach.<sup>246</sup>

Under Florida law, when an alleged juvenile delinquent has been determined to be incompetent, the trial court may order commitment of the child accused of delinquent acts to DCF, but only where the alleged act constitutes a felony.<sup>247</sup> Significantly, as the court held in *Department of Children & Family Services v. A.A.S.T.M.*,<sup>248</sup> the DCF may not receive a child determined to be incompetent where the charge is merely a misdemeanor.<sup>249</sup> The court said nothing about what happens to a child under these circumstances.

The Florida disposition statute in delinquency cases provides for a variety of legislatively authorized dispositional alternatives.<sup>250</sup> In *C.M. v. State*,<sup>251</sup> a child entered a plea of guilty to the charge of aggravated fleeing or attempting to elude a law enforcement officer but objected to a condition of community control requiring him to write a letter of apology to the driver of the car he was following and to have no contact with his or her property.<sup>252</sup> The appeals court held that, under the facts of the case, the disposition met the appropriate standard of being reasonably related to the offense, to

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241. *Id.*

242. *Id.*

243. *Id.*

244. *P.W.G.*, 702 So. 2d at 490.

245. *Id.* at 491.

246. *Id.*

247. FLA. STAT. § 985.223 (Supp. 1998).

248. 706 So. 2d 367 (Fla. 5th Dist. Ct. App. 1998).

249. *Id.* at 367.

250. FLA. STAT. § 985.231 (1997).

251. 696 So. 2d 1350 (Fla. 4th Dist. Ct. App. 1997).

252. *Id.* at 1350.

rehabilitation of the child, or protection of the public, and was therefore, a valid condition of probation or community control.<sup>253</sup>

Under Florida law it has been held that conduct which is offensive to the court and which shows a lack of contrition or remorse is not sufficient to overcome the burden placed upon a trial court when it disregards placement recommendations by DJJ.<sup>254</sup> In *R.D.S. v. State*,<sup>255</sup> the court elected to disregard the minimum risk placement recommendation of DJJ.<sup>256</sup> The court found the child's body language disrespectful and contemptuous.<sup>257</sup> The appeals court held that in order to disregard such a recommendation the court's reasons must be supported by a preponderance of the evidence; therefore, it reversed.<sup>258</sup>

As a general proposition, in Florida, the disposition in a juvenile court proceeding can be no longer than the sentence of an adult convicted of a crime.<sup>259</sup> In *M.G. v. State*,<sup>260</sup> the court adjudicated a child to have committed the offense of battery and ordered her to serve an unspecified period of community control as a sanction.<sup>261</sup> The appeals court held that because the trial court adjudicated her delinquent, an independent period of community control was improper.<sup>262</sup> The disposition imposed must be limited to the amount of time for which an adult could be sentenced for the same crime.<sup>263</sup> It is only when a juvenile has had the adjudication withheld that an indeterminate period of community control is a proper disposition.<sup>264</sup>

The Florida statute contains five restrictiveness levels of placement as to which the DJJ makes recommendations.<sup>265</sup> The First and Second District Courts of Appeal differ as to whether the court must seek an additional recommendation from DJJ after rejecting a recommendation of a particular restrictiveness level. The First District takes the position that a recommendation of community control is not a "restrictiveness level" so that the court's decision not to follow a recommendation requires a re-

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253. *Id.* at 1351.

254. *See generally* *R.D.S. v. State*, 696 So. 2d 1188 (Fla. 1st Dist. Ct. App. 1997).

255. 696 So. 2d 1188 (Fla. 1st Dist. Ct. App. 1997).

256. *Id.* at 1189.

257. *Id.*

258. *Id.*

259. *See* *M.B. v. State*, 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).

260. 696 So. 2d 1340 (Fla. 2d Dist. Ct. App. 1997).

261. *Id.* at 1341.

262. *Id.*

263. *Id.*

264. *Id.*

265. FLA. STAT. § 985.03(46) (Supp. 1998).



submission to the Department for a recommended restrictiveness level.<sup>266</sup> The Second District takes the view that a recommendation of community control is a restriction and thus, no further submission to the Department is required when the trial court decides to depart from the recommended sanction.<sup>267</sup> In *H.H. v. State*,<sup>268</sup> the Fifth District Court of Appeal referenced the opinions from the two other districts but found, under the facts of the case, that the Department had recommended a particular restrictiveness level, and the court departed from the prior holdings of the first and second districts.<sup>269</sup> Thus, where community control played no part in the trial court opinion, the departure was appropriate.<sup>270</sup> Finally, in *L.R.J. v. State*,<sup>271</sup> the First District Court of Appeal certified the question of whether alternative recommendations are necessary as follows:

DOES THE TRIAL JUDGE, ACTING AFTER A DISPOSITION HEARING AND BASED ON SPECIFIC REASONS, HAVE AUTHORITY TO REJECT THE DEPARTMENT'S COMMUNITY CONTROL RECOMMENDATION WITHOUT REMANDING THE CASE TO THE DEPARTMENT FOR AN ALTERNATIVE RECOMMENDATION?<sup>272</sup>

The appellate courts continue to admonish the trial courts on appeals relating to the trial courts' commitments of delinquent children to restrictive levels greater than those recommended by the DJJ because the court believed the children had lied at trial. In *D.A.J. v. State*,<sup>273</sup> the appellate court reversed, explaining once again that such action by the court would impermissibly chill the exercise of Fifth and Sixth Amendment rights of the child at trial.<sup>274</sup>

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266. See *T.M. v. State*, 701 So. 2d 1221 (Fla. 1st Dist. Ct. App. 1997); *C.A.J. v. State*, 706 So. 2d 130 (Fla. 1st Dist. Ct. App. 1998).

267. See *D.L.B. v. State*, 707 So. 2d 844 (Fla. 2d Dist. Ct. App. 1998), *aff'd*, 720 So. 2d 202 (Fla. 1998).

268. 712 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1998).

269. *Id.* at 1203-04.

270. *Id.* at 1204.

271. 706 So. 2d 72 (Fla. 1st Dist. Ct. App. 1998), *rev'd*, 720 So. 2d 212 (Fla. 1998). See also *P.A. v. State*, 23 Fla. L. Weekly D429 (1st Dist. Ct. App. Jan. 30, 1998), *rev'd*, 720 So. 2d 210 (Fla. 1998); *E.D.P. v. State*, 23 Fla. L. Weekly D348 (1st Dist. Ct. App. Jan. 27, 1998), *rev'd*, 724 So. 2d 1144 (Fla. 1998).

272. *L.R.J.*, 706 So. 2d at 73.

273. 699 So. 2d 812 (Fla. 1st Dist. Ct. App. 1997).

274. *Id.* at 813.

The Florida statute governing juvenile proceedings contains an extensive provision governing contempt and contempt sanctions.<sup>275</sup> In *N.M.R. v. State*,<sup>276</sup> a juvenile appealed from a contempt citation for failure to complete court-ordered sanctions and community control that resulted in a sentence of ninety days in jail for indirect criminal contempt.<sup>277</sup> The appellate court held that the contempt statute does not provide for jail as an alternative sanction.<sup>278</sup> Because the appellant was under the jurisdiction of the juvenile court, the appellate court held that the trial court erred by sentencing her as an adult for violation of a court-imposed order while she was under the age of eighteen.<sup>279</sup>

#### D. *Appellate Issues*

The Supreme Court of Florida recently cleared up a question of appellate procedure that had been troubling the intermediate appellate courts.<sup>280</sup> The question in *State v. T.M.B.*<sup>281</sup> was whether sections 924.051(3)–(4) of the *Florida Statutes*, which describe the procedure for preserving appeals in criminal cases, applies to juvenile delinquency cases.<sup>282</sup> The court held that the sections did not apply because the juvenile system is different from the adult system, focusing on rehabilitation rather than punishment.<sup>283</sup> In addition, the terms and conditions of juvenile appeals are addressed exhaustively in chapter 39 of the *Florida Statutes*, and the legislature intended chapter 39 to govern delinquency proceedings.<sup>284</sup>

#### E. *Statutory Changes*

The legislature made a number of modest changes relating to delinquency matters during the 1998 session. It amended section 985.231 of

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275. See FLA. STAT. § 985.216 (Supp. 1998); see also discussion *supra* at p. 14–15.

276. 711 So. 2d 145 (Fla. 5th Dist. Ct. App. 1998).

277. *Id.* at 145–46.

278. *Id.* at 148.

279. *Id.*

280. See *J.D.B. v. State*, 720 So. 2d 255 (Fla. 1st Dist. Ct. App. 1998), *rev'd*, 720 So. 2d 211 (Fla. 1998); *T.M.B. v. State*, 689 So. 2d 1215 (Fla. 1st Dist. Ct. App. 1997), *aff'd*, 716 So. 2d 269 (Fla. 1998); *R.A.M. v. State*, 695 So. 2d 1308 (Fla. 1st Dist. Ct. App. 1997), *aff'd*, 716 So. 2d 769 (Fla. 1998).

281. 716 So. 2d 269 (Fla. 1998).

282. *Id.* at 269.

283. *Id.* at 270–71.

284. *Id.* See also *State v. A.L.W.*, 717 So. 2d 913 (Fla. 1998); *State v. B.D.W.*, 717 So. 2d 460 (Fla. 1998). In 1997, the legislature moved the delinquency provisions from chapter 39 to chapter 985. See Dale, *supra* note 96, at 202–205.

the *Florida Statutes* to provide that the trial court may order a juvenile to undergo random substance abuse testing during the dispositional phase of a delinquency case upon recommendation of DJJ.<sup>285</sup> Testing may also occur after the disposition in the case of a petition alleging a violation of community control or aftercare.<sup>286</sup> The legislature also amended section 985.309 of the *Florida Statutes* to continue providing local funds to operate boot camps that are to be operated under the supervisory authority of sheriffs under contract with the DJJ.<sup>287</sup> The continued funding is interesting in light of the fact that there is a growing body of national literature questioning the rehabilitative benefits of boot camps.<sup>288</sup>

A separate change in dispositional alternatives is the provision for court jurisdiction to place a child who violates community control or aftercare into a residential consequence unit which is a secure location used for children violating community control or aftercare or for youth determined by the court to have violated conditions of community control or aftercare if there is a consequence unit available.<sup>289</sup> The legislature changed the title of intake counselors and case managers to juvenile probation officers with the result that the terminology now matches that found throughout the country.<sup>290</sup> The legislature also took a first step toward dealing with juvenile sexual offenders by establishing a task force to make recommendations for standards relating to licensed professionals who work with juvenile offenders and victims.<sup>291</sup> The legislature further authorized a local child protection team or state attorney to establish a sexual abuse intervention network, in order to collaborate on programs for juvenile offenders and victims and to obtain funds from the Office of the Attorney General or other funding sources.<sup>292</sup> The law now requires DCF and DJJ to disclose to school superintendents the presence of a juvenile with a known history of predatory sexual behavior who is an adjudicated juvenile sexual offender.<sup>293</sup> Finally, the legislature passed a bill authorizing the Juvenile Justice Advisory Board

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285. Ch. 98-55, § 1, 1998 Fla. Laws 361, 362 (codified at FLA. STAT. § 985.231(1)(a)1 (Supp. 1998)).

286. FLA. STAT. § 985.231(1)(a)1 (Supp. 1998).

287. *See generally* Ch. 98-282, 1998 Fla. Laws 2495-99 (codified at FLA. STAT. § 985.309 (Supp. 1998)).

288. *See generally Boot Camps for Juvenile Offenders*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (U.S. Dep't of Justice, Washington, D.C.) Sept. 1997, at 32-33.

289. FLA. STAT. § 985.231(1)(a)1c (Supp. 1998).

290. FLA. STAT. § 985.03(32) (Supp. 1998).

291. FLA. STAT. § 985.403 (Supp. 1998).

292. *Id.*

293. *See* FLA. STAT. § 39.411 (Supp. 1998); FLA. STAT. § 490.012 (Supp. 1998); FLA. STAT. § 490.0145 (Supp. 1998); FLA. STAT. § 985.308 (Supp. 1998); FLA. STAT. § 985.04 (Supp. 1998).

to conduct a study on a number of educational matters in the juvenile justice system.<sup>294</sup>

## VII. CONCLUSION

The Florida appellate courts continue a long tradition of admonitions to the trial courts to comply with the statutory mandates of chapters 39 and 985. At the same time, the appellate courts continue the laudable process of statutory interpretation. The Supreme Court of Florida has handed down several important cases including its most recent interpretation of statutory rape.<sup>295</sup>

Finally, the legislature, while not active in the delinquency field to the extent it has been in prior years, did make a number of significant changes to the dependency and termination of parental rights statute.<sup>296</sup> The most significant was the expansion of the right to counsel for indigent parents in dependency proceedings, a long overdue change.<sup>297</sup>

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294. *See generally* FLA. STAT. § 230.23 (Supp. 1998).

295. *See* J.A.S. v. State, 705 So. 2d 1381 (Fla. 1998).

296. *See, e.g.*, 1998 Fla. Laws 98-403; 1998 Fla. Laws 98-417.

297. FLA. STAT. § 39.013 (Supp. 1998).

## A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws

Mona Markus\*

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### I. INTRODUCTION

Sam Brown is in his early twenties. He has a drug problem and has been in and out of courts throughout his life, once on a murder charge. Sam moves to a small town in upstate New York, and over the course of two years, he goes on a killing spree. He selects his victims from among the town's most vulnerable youths. He finds them outside schools and in the local park. He picks teenagers with family problems, high school dropouts, and even a thirteen-year-old ninth-grader. These kids go with him voluntarily. They do not know the danger they are in or that Sam is carrying a deadly weapon with him wherever he goes. One at a time, Sam kills ten of

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the girls. Although his crimes are detected, Sam is not put on trial. Why does Sam escape prosecution?

Sam Brown's real name is Nushawn Williams.<sup>1</sup> Mr. Williams, who is HIV-positive, is alleged to have had sexual intercourse with at least forty-eight females<sup>2</sup> after having learned of his HIV status in 1996, and to have kept a tally of the women with whom he had intimate relations.<sup>3</sup> At least thirteen of these females (ages thirteen to twenty-two) are believed to have contracted the HIV virus from Mr. Williams,<sup>4</sup> ten of them after he learned he was HIV-positive. Two of these women have given birth to HIV-positive babies.<sup>5</sup> One young man was also infected when he had sex with one of the females.<sup>6</sup> Absent a medical breakthrough, these sixteen people will die of HIV<sup>7</sup> as a result of Mr. Williams' actions.<sup>8</sup>

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1. With only minor alterations, this could be the story of other HIV-transmitters as well. For example, in Vicksburg, Mississippi, 52 women identified an HIV-positive man as the source of their venereal disease infection, and 12 of them, ages 14–20, also have tested positive for HIV. See Shannon Brownlee et al., *AIDS Comes to Small-Town America*, U.S. NEWS & WORLD REP., Nov. 10, 1997, at 52.

In Missouri and Illinois, a man named Darnell McGee, who tested positive for HIV in 1992, infected at least 30 women and had sex with hundreds more. See Kristina Sauerwein, *Some HIV Carriers Don't Care Who They Have Sex With*, ST. LOUIS POST-DISPATCH, Nov. 23, 1997, at B1.

In Traverse City, Michigan, an HIV-positive man named James Jones had sex with at least 10 females, ages 15–35, without disclosing his HIV-infection and usually without using condoms. See Jim Dyer and Kristin Storey, *In Traverse City: HIV Carrier Ignites Town Sex Scandal*, THE DETROIT NEWS, Dec. 19, 1997, at C1. It is not known whether any of these women actually contracted the disease. See John Flesher, *HIV-Infected Man to be Charged With Failing to Notify Partners*, ASSOCIATED PRESS, Dec. 17, 1997, available in 1997 WL 4897239.

2. Henry L. Davis, *Latest Tests Reveal Williams Allegedly Infected 13 Women*, BUFFALO NEWS, Dec. 10, 1997, at B4. These 48 women had sexual relations with 85 other people. *Id.* In addition, 10 of Mr. Williams's sexual partners in New York City have tested positive for HIV, but it is not known if they contracted the disease from Mr. Williams or from someone else. See Richard Perez-Pena, *Two Births Lengthen List in One-Man H.I.V. Spree*, N.Y. TIMES, Jan. 29, 1998, at B5.

3. See Brownlee, *supra* note 1.

4. See Davis, *supra* note 2.

5. See Perez-Pena, *supra* note 2.

6. See Davis, *supra* note 2.

7. Human Immunodeficiency Virus ("HIV") is the name given to a virus that invades the body's immune system. Acquired Immune Deficiency Syndrome ("AIDS") describes a number of related conditions that are usually, but not always, the actual cause of death in the people infected with the HIV virus. See Eric L. Schulman, *Sleeping With the Enemy: Combatting the Sexual Spread of HIV-AIDS Through A Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 962–63 (1996). For the purposes of this article, both AIDS and HIV will be referred to as HIV.

Nonetheless, the only crime for which Mr. Williams has been charged thus far is statutory rape for his sexual relationship with the thirteen-year-old girl who contracted HIV from Mr. Williams. Prosecutors likely will not charge him with murder or attempted murder because they would be unlikely to get a conviction.<sup>9</sup> There is strong circumstantial evidence that these women contracted HIV from Mr. Williams, in light of the women's youth, their relatively limited number of sexual partners, and the fact that these crimes took place in a small town.<sup>10</sup> Yet, proving murder or attempted murder will be difficult for other reasons. For one thing, the women are still alive and are likely to outlive Mr. Williams, who contracted the virus before the women. Additionally, evidence of intent to kill, an element of both murder and attempted murder, is unavailable.

Mr. Williams may be charged with assault in the first degree and/or reckless endangerment, which carry maximum sentences of twenty-five and seven years, respectively.<sup>11</sup> However, proving these crimes will also be difficult, because they require a showing of present physical injury, which might require proof that the victims are showing symptoms. Furthermore, the prosecution would have to show that the victims contracted the disease from Mr. Williams, which is also challenging to prove. Similar prosecutions in other states, against other modern day "Typhoid Harrys,"<sup>12</sup> have not been successful for these reasons.<sup>13</sup> Thus, Mr. Williams may well serve no time for the deaths of these women. Moreover, Mr. Williams' conduct as to the numerous other women who were put at risk of contracting the disease, but did not actually contract it, will go unpunished.

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8. While new treatments such as protease inhibitors have improved the conditions of HIV-infected people, there is no cure for the disease. See *id.* at 959. It is invariably fatal.

9. Jennifer Tanaka & Gregory Beals, *The Victims' Stories*, NEWSWEEK, Nov. 10, 1997, at 58-59.

10. Unlike larger, more populous areas, Chautauqua County employs only one full-time contract tracer. Because this one individual was informed of each positive test result from Mr. Williams' victims, he was able to identify the links between them and therefore to determine Mr. Williams' identity. See Richard Perez-Pena, *Tracing an HIV Outbreak*, ORANGE COUNTY REG., Nov. 16, 1997, at A27. Had this epidemic occurred in a jurisdiction with more contact tracers, Mr. Williams might not have been identified as the source of the infections. *Id.*

11. See Brian A. Brown, *The Charge is Murder, the Weapon AIDS*, ASIAN WALL ST. J., Nov. 20, 1997, at 10.

12. Tanaka & Beals, *supra* note 9, at 55.

13. See, e.g., Linda Deutsch, *Attempted-Murder Charges Dropped in AIDS-Blood Case*, ORANGE COUNTY REG., Dec. 2, 1987, at A03 (discussing dismissed attempted murder charge against a defendant who sold AIDS-infected blood to a plasma bank); Joseph Perkins, *HIV Nushawn: A New Age Typhoid Mary*, LAS VEGAS REV. J., Nov. 13, 1997, at 15B (discussing failure of prosecutors to obtain felony convictions against HIV-positive men who had unprotected sex without disclosing HIV-infection).

If Mr. Williams had infected these women in a different state, a far more effective tool might be available to prosecutors. At least twenty-nine states<sup>14</sup> have statutes that criminalize exposing an individual to the HIV virus without disclosing HIV-positive status ("HIV transmission/exposure" laws). While these statutes vary in terms of the particular conduct prohibited and the degree of specificity of the statutory language, they share a common purpose: to deter and punish those who spread a fatal disease ("HIV-transmitters").<sup>15</sup> Of course, their application is not limited to individuals like Mr. Williams who have exposed only casual contacts, but extends to any HIV-positive individuals who do not take care to protect others, including loved ones, from exposure to the disease.

These statutes do have their drawbacks.<sup>16</sup> For example, they may discourage testing, as an individual can only be guilty of the offense if he or she knows he or she is HIV-positive.<sup>17</sup> Also, enforcement of the statutes may impede efforts to preserve the confidentiality of medical records. Furthermore, broader statutes, such as those that include exposure to sweat and other noninfectious bodily substances among the list of prohibited activities, may further public misconceptions about what activities can spread the virus. Also, these broad statutes arguably criminalize conduct having no possibility of infecting a partner.<sup>18</sup>

Despite these significant disadvantages, HIV transmission/exposure statutes are preferable to traditional criminal statutes as a means to punish and deter HIV transmission and exposure<sup>19</sup> for several reasons. First, these statutes remove many of the barriers to conviction posed by traditional criminal statutes to ensure that guilty perpetrators will be punished. Additionally, they signal to the public

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14. According to the National Conference on State Legislatures, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington make it a felony to knowingly transmit or expose another to HIV. Alabama, Kansas, Maryland, and Montana consider this a misdemeanor offense, and North Dakota considers it an infraction. Lee Sanchez & Stephanie Wilson, *Criminalization of HIV Transmission and Exposure* (Mar. 31, 1998) <<http://www.stateserv.hpts.org/public/issueb.nsf/970e745f9e50ddca852564f0007b3abd/89201b028fca1962852565c5005b60ad?OpenDocument>>.

15. Most HIV transmission/exposure statutes, including the model statute contained in the Appendix, prohibit other kinds of conduct like needle sharing or organ selling in addition to exposure through sexual conduct. For the most part, consideration of other prohibitions is beyond the scope of this paper.

16. See discussion *infra* Part III.C.

17. The issue of what constitutes knowledge is addressed *infra* Part III.A.1.

18. See Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475, 487 (1991).

19. See *id.* at 512-13.



that spreading the HIV virus is criminal conduct that will not be tolerated. By specifically delineating to HIV-positive individuals what activities are prohibited, states send a clear message that people who engage in risky behavior will be prosecuted through the criminal laws.<sup>20</sup> This is actually advantageous to HIV-positive individuals, because they know exactly what conduct is, in fact, prohibited, and what conduct is permissible. Under general criminal offenses, HIV-positive individuals may avoid many non-risky activities because a broad range of behavior could potentially satisfy the elements of an offense.

After awareness was raised by the Jamestown epidemic allegedly caused by Mr. Williams, New York legislators began pushing for such a law. Assemblyman Stephen B. Kaufman (82d District, Albany, NY) has introduced legislation creating the crime of aggravated reckless endangerment for individuals who knowingly expose others to HIV through uninformed sexual contact or needle sharing. The crime would be punishable by up to fifteen years imprisonment.<sup>21</sup> The remaining twenty states should follow suit, and establish the offense of "HIV transmission/exposure,"<sup>22</sup> to ensure that those who knowingly expose others to a fatal disease will be brought to justice.

## II. GENERALLY APPLICABLE CRIMINAL AND PUBLIC HEALTH REMEDIES

### A. General Criminal Offenses

It is sometimes possible to prosecute those who knowingly transmit the HIV virus through existing criminal statutes.<sup>23</sup> In fact, such prosecutions

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20. Despite continued efforts at public education, there is disturbing evidence that people are engaging in risky sexual practices. For example, a recent *NEWSWEEK* article reports that there is a growing number of gay men, known as barebackers, who do not practice safe sex. See Marc Peyser, *A Deadly Dance*, *NEWSWEEK*, Sept. 29, 1997, at 76-77. And a recent Gallup poll shows that the number of Americans concerned about contracting AIDS has dropped from 42% in October 1987 to 30% in October 1997. See Charles W. Henderson, *HIV Transmission (Health) Fear and Appraisal of Safe-Sex Warnings in NY Scare*, *AIDS WEEKLY PLUS*, Nov. 24, 1997, available in 1997 WL 14715036.

21. Other HIV-related bills have been introduced in New York, including one that would impose mandatory testing for prison inmates who attack prison guards (A.5795, 220th Leg. (N.Y. 1997) (introduced by Assemblyman Daniel L. Feldman, D-Brooklyn)), and another that would weaken confidentiality laws to aid health agencies in their efforts to locate sex partners of infected people (A.6629, 220th Leg. (N.Y. 1997) (introduced by Assemblywoman Nettie Mayersohn, D-Queens)).

22. For a proposed statute, see Appendix *infra*.

23. Additionally, the victim of an HIV-transmitter may seek recourse through tort law. For a discussion of tort recovery for HIV transmission, see Schulman, *supra* note 7, at 968-71.

have been made in the past, sometimes successfully.<sup>24</sup> Many of these prosecutions involved HIV-positive individuals who knew of their respective infections, and who bit other people, usually police officers or prison guards.<sup>25</sup> Depending on the conduct involved, criminal offenses such as murder, attempted murder, manslaughter, negligent homicide, assault, or reckless endangerment might be used to prosecute those who expose others to the HIV virus.

Some commentators have argued that these general criminal statutes are appropriate for use in prosecuting HIV-transmitters.<sup>26</sup> A traditional murder statute, for example, is generally applied to all sorts of homicides, regardless of the particular circumstances or the weapons used. According to this argument, the HIV virus is a deadly weapon like any other.<sup>27</sup> Just as killing someone with the use of a gun, knife, or hammer is considered to be murder, so should killing someone with the use of the HIV virus be considered murder. Under this view, general criminal statutes are as well suited for use in HIV prosecutions as in any other crime.

However, HIV prosecutions are unlike those arising under other circumstances. They involve unique considerations that render them ill fitted for prosecution under general criminal statutes. Not only does each general criminal offense contain elements that are difficult to prove in the context of HIV prosecutions, but also the use of general criminal statutes is disadvantageous to defendants and potential defendants.

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24. See, e.g., *State v. Stark*, 832 P.2d 109 (Wash. Ct. App. 1992) (affirming the assault convictions of an HIV-positive defendant who had engaged in unprotected oral, anal, and vaginal intercourse); *Zule v. State*, 802 S.W.2d 28 (Tex. Ct. App. 1990) (affirming the conviction of an HIV-positive man who had anal intercourse with a minor). Additionally, knowing exposure of others to HIV is sometimes considered an aggravating factor for purposes of sentences imposed for the commission of other crimes such as sexual assault or rape. See, e.g., *State v. Guayante*, 783 P.2d 1030, 1032 (Or. Ct. App. 1989).

25. See, e.g., *United States v. Moore*, 669 F. Supp. 289 (D. Minn. 1987) (upholding the assault conviction of an HIV-positive inmate who bit a corrections officer); *State v. Smith*, 621 A.2d 493 (N.J. 1993) (upholding the attempted murder and aggravated assault convictions of an HIV-positive inmate who bit corrections officers); *Scroggins v. State*, 401 S.E.2d 13 (Ga. Ct. App. 1990) (upholding the aggravated assault with intent to murder conviction of a person who bit a police officer).

26. See, e.g., Michael L. Closten & Jeffrey S. Deutschman, *A Proposal to Repeal the Illinois HIV Transmission Statute*, 78 ILL. B. J. 592, 596 (1990).

27. In fact, in Texas, an HIV-positive defendant's penis and bodily fluids have been held to be deadly weapons sufficient to sustain a conviction for aggravated sexual assault. See *Najera v. State*, 955 S.W.2d 698, 701 (Tex. Ct. App. 1997). The *Model Penal Code* defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury." MODEL PENAL CODE § 210.0 (1985).

The application of murder statutes to HIV transmission demonstrates that general criminal statutes are undesirable for use in prosecuting these cases. Under the *Model Penal Code*,<sup>28</sup> a defendant is guilty of murder where he purposefully or knowingly caused the death of another human being, or where such death is caused by an action "committed recklessly under circumstances manifesting extreme indifference to the value of human life."<sup>29</sup> A conviction for murder requires that three elements be proved: 1) conduct; 2) state of mind; and 3) causation.<sup>30</sup>

The first element, proof of conduct, is the easiest to establish.<sup>31</sup> It requires a showing that the defendant engaged in the conduct that resulted in HIV transmission. For example, it might involve the presentation of evidence that the defendant did have sexual relations with the victim. It is the second and third of these elements that pose barriers to effective prosecution.<sup>32</sup>

As to the second element, the perpetrator must have the intent to kill through transmission of the HIV virus. For first degree murder, the actor must know of his or her HIV-positive status, and must desire to spread the virus to another person. This element may not be present in many HIV transmission cases, as the goal of the perpetrator may not be to spread the virus, but just to have sexual relations.<sup>33</sup> Even where the perpetrator did plan or hope to spread the virus, this is difficult to prove absent an admission by the defendant.

Lesser degrees of murder require a knowing or reckless state of mind,<sup>34</sup> which are perhaps easier to establish but are nonetheless

28. While many states do not follow the *Model Penal Code*, this paper will refer to *Model Penal Code* definitions because of the wide variety of statutes that have been enacted by the fifty states.

29. MODEL PENAL CODE § 210.2(1)(b) (1985). In states that have enacted the common law, murder is defined as an unlawful killing with malice aforethought.

30. See MODEL PENAL CODE § 210.1(1), (2) (1985).

31. For instance, in the Nushawn Williams case, Mr. Williams admitted to having had sexual relations with many of the victims. James Barron, *Officials Link Man to 11 Teen-Agers With H.I.V.*, NEW YORK TIMES, Oct. 28, 1997, at A2. In fact, he himself identified many of them to public health officials. *Id.*

32. See Marvin E. Schechter, *AIDS: How the Disease is Being Criminalized*, 3 CRIM. JUST. 6, 8 (1988).

33. When an individual discharges a gun at someone's head or thrusts a knife at a person's chest, the intent to injure or kill usually can be readily inferred from the conduct itself. However, when an HIV-positive individual engages in sexual activity, such an intent can not be presumed.

34. Common law states such as Maryland generally indicate what types of murder constitute first degree, such as that committed in perpetration of a rape, see MD. CODE ANN., Crimes and Punishments §§ 408-10 (Supp. 1998), and classify all types of murder that do not fall into these categories as second-degree murder, see *id.* § 411.

challenging. Reckless murder, for example, requires conscious awareness both of HIV-positive status and of the risk of infecting another through the contested behavior, accompanied by "extreme indifference to the value of human life."<sup>35</sup> And knowing murder, which requires knowledge that the conduct will result in death, is probably impossible to establish in light of the fact that the virus is not transmitted by every sexual or other bodily contact.<sup>36</sup>

Even where the requisite degree of intent can be shown, the third element, causation, often presents an insurmountable barrier to conviction. It is difficult to establish that the disease was contracted from the defendant, especially where the victim has had multiple sexual partners or numerous possible sources of infection.<sup>37</sup> The potentially long period between exposure and detection exacerbates this problem. It can take as long as ten years before a victim develops symptoms of the HIV virus.<sup>38</sup> Unless the victim goes in for an HIV test before this time, he or she will not know until long after that the criminal act has taken place. Even where the victim does go in for testing absent symptoms, it can take as many as six months or more before the victim is seropositive, meaning that the HIV virus is detectable in the blood.<sup>39</sup> Given these obstacles, establishing causation may not be possible.<sup>40</sup>

The final challenge in prosecuting HIV-transmitters under traditional murder statutes is that the prosecution cannot proceed until the victim dies. Although HIV is invariably fatal, the victim may not die for many years.<sup>41</sup> Clearly, such a delay will significantly hinder both the prosecution and the defense in a case brought under a murder statute. Also, many states still follow the year and a day rule, whereby murder cannot be charged unless the victim dies within a year and a day of the criminal activity.<sup>42</sup> Further, given that the defendant also has the HIV virus, and necessarily

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35. MODEL PENAL CODE § 210.2(1)(b) (1985).

36. See Kathleen M. Sullivan & Martha Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 162-63 (1988).

37. For a discussion of the issues involved in proving even the relatedness of two individuals' HIV-infections, much less evidence of causation. See *State v. Schmidt*, 699 So. 2d 448 (La. Ct. App. 1997).

38. See Schulman, *supra* note 7, at 966.

39. See Tierney, *supra* note 18, at 480-81.

40. See *id.* at 493.

41. According to research current in February 1996, 95% of people with HIV will die within 12 years of contracting the disease. See *Najera v. State*, 955 S.W.2d 698, 701 (Tex. Ct. App. 1997).

42. See *State v. Minster*, 486 A.2d 1197, 1200 (Md. 1985) (citing jurisdictions retaining the year and a day rule).

contracted it before the victim, it is likely that he or she will have died before the prosecution can go forward, rendering the prosecution moot.<sup>43</sup>

Prosecutions for HIV transmission under traditional murder statutes are also unfair to defendants. In addition to the fact that they may take place long after the actual exposure occurred, there may be no protection for defendants who warned victims of their HIV-positive status. Because consent is not a defense to murder, even those sexual contacts that took place after full disclosure by the HIV-positive individual, and after a conscious affirmance of the desire to proceed with the sexual encounter by the "victim," would be considered criminal.<sup>44</sup> Thus, HIV-positive individuals are effectively banned from engaging in any sexual contact whatsoever, at least with uninfected individuals. Any sexual contact, despite the degree of disclosure and consent that might be present, would constitute murder under traditional criminal murder statutes.<sup>45</sup>

Manslaughter prosecutions pose similar difficulties. Although a first degree manslaughter prosecution does not require proof of an intent to transmit the virus, but merely consciousness that certain conduct might result in transmission, the *mens rea* element is still difficult to establish. Moreover, the difficulties with causation that are present in murder prosecutions are identical in manslaughter cases.<sup>46</sup>

As with murder statutes, the use of manslaughter statutes is also detrimental to the defendant. The jury must evaluate how a defendant should have acted, resulting in the risk of prejudice and selective enforcement.<sup>47</sup> It is possible that a person could be convicted of manslaughter even absent knowledge of HIV-positive status if the factfinder determines that infection was due to behavior involving "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."<sup>48</sup> A jury that disapproves of certain lifestyles might consider the commonplace practices of people who live that lifestyle as a deviation from law-abiding conduct even where that conduct is perfectly legal.

Use of negligent homicide statutes is also ill-advised. Since an individual is guilty of negligent homicide when he ignores a risk of which he should be aware, this offense could be used to prosecute those who do not know of their HIV-positive status. While negligent homicide might be easier to prove than murder, it would permit factfinders, usually juries, to impose

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43. See Tierney, *supra* note 18, at 492.

44. See Sullivan & Field, *supra* note 36, at 165.

45. *Id.*

46. See Tierney, *supra* note 18, at 494.

47. See Sullivan & Field, *supra* note 36, at 164.

48. MODEL PENAL CODE § 2.02(2)(c) (1985).

their interpretations of what constitutes “reasonable” conduct, and would allow prejudice and discrimination to govern the determination of guilt.<sup>49</sup>

Prosecution under an assault statute can proceed before the death of the victim, making both prosecution and defense easier in some respects. However, similar requirements of intent and causation exist. The defendant must have known of his or her HIV-positive status and have believed that the disease could be spread through the conduct in question.<sup>50</sup>

Unless “likeliness” of transmission can be demonstrated, assault prosecutions may not succeed. Additionally, “likeliness” may be hard to establish. In *Guevara v. Superior Court*,<sup>51</sup> a California judge granted the defendant’s motion to set aside the information as to the assault charges because of the lack of proof that “one or two individual incidents of unprotected sex between an HIV-positive male and an uninfected female [was] . . . ‘likely to produce great bodily injury.’”<sup>52</sup> Given that one incident of unprotected sexual contact is not, in fact, “likely” to result in contraction of the disease,<sup>53</sup> jurisdictions that contain “likeliness” in their definition of the crime may not be able to use assault to punish HIV-transmitters.<sup>54</sup>

One advantage of using assault statutes to prosecute HIV transmission is that consent, participation in consensual sexual contact after disclosure of HIV-infection, is probably a defense to assault.<sup>55</sup> In *Guevara*, the court held that the defendant, who knew he was HIV-positive, could not assert that the victim, a minor, consented to the assault merely by participating in a consensual sexual encounter with the defendant.<sup>56</sup> The *Guevara* court, however, did not address the situation where the defendant has disclosed his HIV-infection status to the victim, leaving open the argument that disclosure of HIV-positive status and procurement of consent to proceed before engaging in sexual relations constitutes a defense to assault charges.

An additional, and substantial, disadvantage with each of the above discussed criminal offenses (murder, manslaughter, negligent homicide, and assault) is that risky behavior that does not actually result in transmission

49. See Sullivan & Field, *supra* note 36, at 164–65.

50. See Tierney, *supra* note 18, at 498.

51. 73 Cal. Rptr. 2d 421 (Cal. Ct. App. 1998).

52. *Id.* at 424.

53. There may be as little as a 1 in 500 risk of contracting HIV through sexual activity absent aggravating factors like the presence of another sexually transmitted disease. See Michael L. Closten et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 961 (1994).

54. Even where assault can be proven, it is only a misdemeanor crime. MODEL PENAL CODE § 211.1(1) (1985). Assault may carry insufficient punishment, especially in those circumstances where the transmission was purposeful or knowing.

55. See Sullivan & Field, *supra* note 36, at 168.

56. See *Guevara*, 73 Cal. Rptr. 2d at 423–24.

will go unpunished. Unless the victim contracts the disease, the HIV-infected individual is guilty of no crime, regardless of whether he intended to infect or consciously disregarded the risk of infecting the victim. His behavior, however, may be just as reprehensible as that of the individual who actually did infect his partner. For this reason, murder, manslaughter, and other criminal offenses requiring actual transmission are an insufficient means of punishing those who expose others to HIV.

Attempt crimes such as attempted murder have the advantage that they can be used to charge defendants where no actual transmission occurs. Even absent transmission, a person who "does . . . anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part" may be guilty of an attempt crime.<sup>57</sup> Thus, attempt crime prosecutions can be pursued against individuals who engage in risky behavior. Defendants who engage in like behavior are treated equally regardless of whether HIV transmission occurs. Also, because actual transmission is not required, the element of causation that poses such problems in prosecutions for the choate crimes discussed above is eliminated.

However, attempt crimes have disadvantages. They are hard to prove because they require a strong showing of intent. Because attempt generally requires a purposeful or knowing state of mind, at least under the *Model Penal Code*, a person would have to have the goal of infecting another individual, or knowledge that infection would, in fact, occur in order to be found guilty.<sup>58</sup> Not only is this a relatively rare occurrence within the scope of HIV transmissions,<sup>59</sup> but it is also difficult to prove.<sup>60</sup>

57. MODEL PENAL CODE § 5.01(1)(b) (1985).

58. In *State v. Hinkhouse*, 912 P.2d 921 (Or. Ct. App. 1996), for example, a conviction for attempted murder and attempted assault was affirmed, but only because there was evidence both that the defendant had stated his intent to spread the virus and that the defendant took precautions including condom usage and disclosure when having relations with his future wife, but not when intimate with other women. *Id.* at 925.

In another case, an attempted manslaughter charge against a prostitute was dismissed on the grounds that attempt to engage in prostitution despite knowledge of HIV-positive status could not be equated to the intent to kill. See *State v. Sherouse*, 536 So. 2d 1194, 1194 (Fla. 5th Dist. Ct. App. 1989).

59. See Sullivan & Field, *supra* note 36, at 167.

60. In *Smallwood v. State*, 680 A.2d 512 (Md. 1996), for example, the Maryland Court of Appeals reversed an HIV-positive defendant's conviction for attempted murder and assault with intent to murder because the court found that there was insufficient evidence of intent. *Id.* at 514. The court noted the absence of a statement of intent by the defendant, distinguishing the case from others where the defendants "have either made explicit statements demonstrating an intent to infect their victims or have taken specific actions demonstrating such an intent and tending to exclude other possible intents." *Id.* at 516. While the defendant

Additionally, because impossibility generally is not a defense,<sup>61</sup> attempt crimes may be used to prosecute intent to transmit through biting or spitting.<sup>62</sup> These are activities that are unlikely to actually transmit the HIV virus.<sup>63</sup> Criminalizing these activities, then, reinforces erroneous beliefs about transmission, thus undermining public education efforts.<sup>64</sup> Furthermore, it punishes individuals who have not actually harmed anyone and who could not have harmed anyone by the activity for which they are being prosecuted.<sup>65</sup> Prosecutions for this conduct may be warranted because some of the perpetrators do, in fact, desire to infect another and may be quite dangerous. The problem is that HIV-positive individuals prosecuted for biting or spitting may *not* actually have intended harm, and may have been fully aware that their actions were incapable of spreading the disease. This concern is especially high where there is limited or no direct evidence, such as incriminating statements, that reveal an intent to kill.

Reckless endangerment is arguably the easiest of traditional criminal offenses to establish. It does not require a finding of actual transmission,<sup>66</sup> and thus, no proof of causation must be presented. Additionally, no intent or purpose is required, but only that the defendant recklessly engaged in conduct "which places or may place another person in danger of death or serious bodily injury."<sup>67</sup>

Reckless endangerment is also easier to establish than other crimes because actual knowledge of HIV status may not be needed where the defendant had symptoms and/or engaged in risky behavior. However, this

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would probably have been found guilty under an HIV transmission/exposure law, as the court noted that they "ha[d] no trouble concluding" that the defendant had knowingly exposed the victim to the risk of an infection, the conviction for attempted murder had to be dismissed because there was insufficient evidence that the defendant had an intent to kill. *Id.* at 517 n.4.

61. See Closen, *supra* note 53, at 930.

62. Of the more than 10 attempted murder convictions for HIV transmission or exposure around the country, most have involved biting or spitting. See Brown, *supra* note 11, at 10.

63. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1023-25 (1989).

64. See Closen, *supra* note 53, at 933-34.

65. In *State v. Smith*, 621 A.2d 493, 495 (N.J. 1993), for example, an attempted murder conviction was affirmed despite the appellant's contention that he did not intend to transmit the virus and did not believe it was possible to transmit the virus through a bite. *Id.* at 495-96. The defendant specifically appealed his conviction to no avail on the grounds that HIV could not be spread through a bite. *Id.*

66. In fact, prosecution under reckless endangerment statutes is possible even absent any evidence that the defendant himself is actually infected. See Tierney, *supra* note 18, at 495. A sexually active homosexual male with HIV-like symptoms who engages in unprotected intercourse may satisfy the elements of the crime. *Id.*

67. MODEL PENAL CODE § 211.2 (1985).



poses a risk to potential defendants. There are serious negative ramifications to holding people responsible for knowledge of HIV status merely on the basis of their conduct, for this gives factfinders a dangerous opportunity to discriminate against disfavored groups.<sup>68</sup> For example, it permits a factfinder to equate homosexuality with HIV-positive status. Use of the reckless endangerment statutes raises the possibility of a huge scope of enforcement against all those who engage in high risk behavior. Like manslaughter, this offense allows for a subjective jury determination of what constitutes "reckless" behavior.

Not only can the offense of reckless endangerment be used to the detriment of a criminal defendant, it also imposes burdens on the criminal justice system in light of the difficult and potentially prejudicial evidentiary requirements like past sexual history that might be implicated.<sup>69</sup> And like assault, reckless endangerment is a misdemeanor, not a felony, which may undermine its punitive and deterrent effects.<sup>70</sup>

In addition to the disadvantages in the use of general criminal offense statutes as discussed above, there are no limitations on what conduct can trigger a prosecution. With HIV transmission/exposure laws, prohibited conduct is clearly delineated.<sup>71</sup> Under general criminal statutes, however, prosecutors have broad discretion to pursue cases involving conduct that should not be considered criminal. Not only is this situation disadvantageous to potential criminal defendants, but it also creates a risk that the public will harbor a negative view about the advisability of criminalizing HIV transmission/exposure.<sup>72</sup>

## B. *Public Health Crimes*

In several states, it is a crime to expose others to contagious diseases, and in others, to expose others to sexually transmitted diseases.<sup>73</sup> In some respects, these statutes seem suitable for use in prosecuting HIV-transmitters, as HIV is both sexually transmitted and contagious in certain circumstances. Generally speaking, these crimes capture activity only by those who knew of their infection, thus limiting the role of prejudice in HIV prosecutions.

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68. See discussion *infra* Part III.A.1.

69. See Tierney, *supra* note 18, at 495–96.

70. See *id.* at 496.

71. See discussion *infra* Part III.

72. See Closen, *supra* note 53, at 935–36.

73. See, e.g., COLO. REV. STAT. ANN. § 25-4-401(2) (West 1997); S.C. CODE ANN. § 44-29-60 (Law. Co-op. Supp. 1998); UTAH CODE ANN. § 26-6-5 (1998).

However, these statutes do not take into account the severity of the HIV virus and the inevitability of death upon contraction. Unlike most other sexually transmitted diseases ("STDs") and most contagious diseases, HIV is incurable and is invariably fatal. Many of these statutes are inadequately lenient in terms of the punishment they impose on offenders, in some cases providing for only a small fine for violations.

Additionally, like some of the statutes that are specific to HIV transmission,<sup>74</sup> some of these public health statutes are overly broad in the sense that they criminalize conduct that cannot spread the HIV virus.<sup>75</sup> Sexually transmitted disease statutes are also, by definition, underinclusive in light of the fact that HIV can be transmitted by nonsexual contact such as needle sharing or blood transfusions.<sup>76</sup>

Finally, as with the use of murder statutes, which would, in effect, criminalize all sexual contact regardless of consent,<sup>77</sup> many of these public health statutes would require permanent abstinence.<sup>78</sup> Given that it is possible to prevent or greatly limit the risk of contracting the disease through safe sex practices, a permanent and unequivocal restriction on all sexual contact is unnecessary.

### C. Public Health Regulations

Some states seek to control HIV transmission through regulatory rather than criminal provisions. Delaware, for example, has a number of regulatory provisions governing the state's ability to quarantine infected persons or to prohibit certain conduct by infected persons, in addition to provisions relating to reporting, confidentiality, and required treatment.<sup>79</sup> Like those of other states, Delaware's public health provisions are not restricted to HIV, but govern all contagious diseases.

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74. See *infra* Part III.A.2.

75. See Sullivan & Field, *supra* note 36, at 170. For example, LA. REV. STAT. ANN. 14:43.5(B) (West 1997) provides that "[n]o person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through *any* means or contact," (emphasis added), without defining what is meant by these terms. Because medical science often cannot rule out the possibility, however infinitesimally small, that the virus cannot be transmitted by a particular type of conduct, this statute could be interpreted to criminalize such things as a kiss.

76. See Sullivan & Field, *supra* note 36, at 170–71.

77. See discussion *supra* Part II.A.

78. See, e.g., COLO. REV. STAT. ANN. § 25-4-401(2) (West 1997) (stating: "It is unlawful for any person who has knowledge or reasonable grounds to suspect that he is infected with a venereal disease to . . . knowingly perform an act which exposes to or infects another person . . .").

79. See DEL. CODE ANN. tit. 16 §§ 701–712 (1997).

Some of these provisions give the state the power to isolate individuals with the HIV virus from contact with other people.<sup>80</sup> Because these provisions are regulatory, not punitive, they are not subject to constitutional restrictions barring cruel and unusual punishment or excessive bail under the Eighth Amendment.<sup>81</sup> Although it is conceivable that a state might seek to segregate all those people infected with the HIV virus,<sup>82</sup> such a broad-reaching provision is unlikely to be politically accepted,<sup>83</sup> and it is not constitutionally permissible under the Due Process and Equal Protection Clauses.<sup>84</sup> Quarantine provisions that provide for restriction only of those HIV-infected individuals whose actions fall within the statute's guidelines, on the other hand, might be constitutionally permissible.<sup>85</sup> Those HIV-positive individuals described as "incurable" or "recalcitrant," who continue to engage in high risk behavior, might be subject to these behavior-based quarantines.<sup>86</sup>

The goal behind these provisions is similar to that of using criminal laws to control HIV: to prevent the spread of the disease and to deter HIV-positive individuals from engaging in behavior with a high risk of transmittal.<sup>87</sup> However, there are several drawbacks to these provisions that render them inferior to criminal prosecutions.<sup>88</sup> These shortcomings include constitutional concerns, insufficient protection of individual rights because of lower evidentiary burdens, and the serious risk of selective enforcement.

For example, the standard of proof for civil confinement and other civil public health remedies, which is "clear and convincing evidence," offers less protection to the infected person than does the criminal "beyond a reasonable

80. See, e.g., COLO. REV. STAT. ANN. §§ 25-4-1401 to 1410 (West 1997); IDAHO CODE § 39-603 (1997).

81. See Sullivan & Field, *supra* note 36, at 145.

82. For example, Proposition 64 on the California Ballot, which was defeated on November 4, 1986, would have allowed authorities to confine HIV-positive individuals to places designated for such purposes. *After the AIDS Vote*, L.A. TIMES, Nov. 7, 1986, at 4.

83. See Sullivan & Field, *supra* note 36, at 146-47.

84. *Id.* at 147.

85. See Gostin, *supra* note 63, at 1036.

86. *Id.* While a behavior-based type of quarantine provision is in many respects superior to a status based system, it poses the significant problem of requiring individualized assessments of behavior. Because personal protections are minimal in the civil context, behavior-based quarantine is undesirable.

87. One benefit of using quarantine provisions over criminal imprisonment is that, because the individual will be in the company only of other HIV-positive individuals, the individual cannot spread the disease to others, which could occur if he is imprisoned.

88. As Larry Gostin observes, "[b]ecause the virus is primarily transmitted by intentional behavior that is within the control of the carrier, it is seen as susceptible to a legal, rather than a public health, solution." See Gostin, *supra* note 63, at 1019.

doubt” standard.<sup>89</sup> Especially where there is the risk of prejudicial or selective enforcement, and where people’s liberty may be infringed by the proceedings, the state should be held to a higher burden of proof. Because HIV is incurable, use of these provisions might constitute a “civil life sentence,”<sup>90</sup> and should be subject to restraint and careful application.

Behavior-based quarantine is also ill-advised because it is unnecessarily broad in terms of the restrictions it imposes. Unlike other contagious diseases, HIV is not airborne nor is it transmitted by casual contact such as touching or kissing.<sup>91</sup> Thus, quarantine is an unnecessary remedy where there is no evidence of behavior that has the capacity to transmit the virus. If an individual has actually engaged in conduct that puts others at risk of contracting a disease, he or she deserves to be punished. If not, the person is merely an innocent victim of a terrible disease who is suffering enough without being forced to submit to a proactive limitation on liberty through quarantine. As Sullivan and Field observe, “AIDS is spread by acts, not by mere proximity . . . . Criminal law punishes culpable acts, not statuses such as being ill or infected.”<sup>92</sup> As such, criminal laws more accurately restrict only that behavior that is prohibited.

### III. HIV TRANSMISSION/EXPOSURE LAWS

Because traditional criminal statutes, public health offense statutes, and public health regulations pose the difficulties discussed in Section II above when applied to HIV exposure and transmission, statutes specifically designed to capture the unique set of circumstances and issues surrounding HIV exposure and transmission should be passed and utilized.<sup>93</sup>

#### A. *What Are HIV Transmission/Exposure Laws and What Do They Prohibit?*

At least twenty-nine states have enacted statutes that specifically criminalize knowingly exposing others to the HIV virus.<sup>94</sup> These statutes,

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89. See Closen, *supra* note 53, at 969–70.

90. Gostin, *supra* note 63, at 1029.

91. See *id.* at 1027.

92. Sullivan & Field, *supra* note 36, at 156.

93. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic concluded, after more than 48 hearings and a year of deliberation, that “HIV infected individuals who knowingly conduct themselves in ways that pose significant risk of transmission to others must be held accountable for their actions.” Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic at XVII (1988).

94. See discussion *supra* Part I. For a discussion of international statutes addressing the issue, see Tierney, *supra* note 18, at 502–10.

while all attempting to serve a similar purpose, vary in several significant respects. For one, some are broadly worded while others are very specific. Also, there is variation as to what conduct is prohibited. For example, some bar just the sale of HIV-tainted blood. Others punish those engaging in a wide range of activities. The basic purpose of these statutes is to criminalize specified conduct that poses a risk of spreading the HIV virus, such as sexual intercourse, unless the infected party discloses his or her HIV-positive status and obtains consent.

There are three elements that must be satisfied to be guilty of criminal HIV transmission/exposure.<sup>95</sup> The first element is knowledge.<sup>96</sup> A defendant cannot be guilty of the crime unless he or she knows, or arguably should know,<sup>97</sup> that he or she is HIV-positive. The second element is that the defendant must have engaged in prohibited contact such as intercourse or oral sex.<sup>98</sup> The final element is the absence of a defense such as consent or,

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95. A good statute will clarify, either in the text or legislative history, that it is meant to be used in place of, not in addition to, traditional criminal offenses. See Closen, *supra* note 53, at 936. While such a provision raises questions about separation of powers and prosecutorial discretion, see *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979), it seems that state prosecutors would be bound to obey it, see *People v. Ford*, 417 Mich. 66, 80 (Mich. 1982) (looking to “several indications that the Legislature did not intend these [two] statutes to be exclusive chargeable offenses”); *People v. Ramsey*, 218 Mich. App. 191, 193 (Mich. Ct. App. 1996) (rejecting defendant’s claim that legislative enactment of a new statute precluded conviction under other statute because language of new statute did not support defendant’s argument that other statute was precluded); *People v. Little*, 434 Mich. 752, 760 (Mich. 1990) (upholding prosecutor’s decision to prosecute under two provisions because “[t]he Legislature’s enactment of [the two statutes] does not indicate any legislative intent to limit the prosecutor’s charging discretion.”).

96. Another method of achieving the same goal is through a strict liability provision. Such a law would provide that anyone who infects another with HIV is guilty of a criminal offense, regardless of whether the perpetrator knew he or she was HIV-positive. This type of provision would have several advantages to existing criminal transmission/exposure laws. It would be easier to prove because no evidence of intent or *mens rea* of any kind would need to exist nor would proof that the defendant had received notification of his HIV-positive status be admissible. Additionally, there would be a strong deterrent against unprotected sex. Similarly, a strict liability provision would encourage people to get tested frequently so that they could be sure they were not putting others at risk of contraction of the virus. However, there are also numerous disadvantages that militate against adoption of strict liability criminal laws of this nature. A primary drawback is that, like most general criminal offenses such as murder, proof of causation would be required. See discussion *supra* Part II.A. Also, criminal remedies should not be applied where the defendant was not aware of the criminal nature of his behavior, as this has no deterrent effect.

97. See discussion *infra* Part III.A.1.

98. This element of the crime poses the most difficulties from a drafting standpoint, and is the subject of much of the disputes on criminal HIV exposure statutes.

perhaps, condom usage.<sup>99</sup> States take different approaches to resolving the disputes around what satisfies these three elements.<sup>100</sup> Some seek to provide more precise guidelines, while others offer only a broad definition of the offense.<sup>101</sup>

### 1. Knowledge

HIV transmission/exposure statutes provide for criminal liability only where the defendant knows of his HIV-positive status.<sup>102</sup> Not every statute, however, is specific as to what constitutes knowledge.<sup>103</sup> Some statutes indicate that the knowledge provision can only be satisfied by positive results from a blood test.<sup>104</sup> Others do not specify what will be deemed "knowledge."<sup>105</sup>

Where an individual has been tested and has been informed by medical or public health personnel that he or she is HIV-positive, it seems uncontroversial that the knowledge element of HIV transmission/exposure is satisfied.<sup>106</sup> The question is whether less than actual knowledge can satisfy

99. In a report published by the Archives of Internal Medicine, 40% of HIV-infected people surveyed indicated that they did not disclose their HIV-positive status to sexual partners, and 57% of these people also indicated they do not always use condoms. *See* Steven Gray, *Debate Looms on HIV Disclosure Laws: Is It Use of Deadly Weapon or Rights Breach?*, STAR-LEDGER (Newark, N.J.), Feb. 22, 1998, at 204.

100. States also provide different penalty levels for violations of their HIV transmission/exposure laws. Of the 29 offenses established by state laws, 25 are felony crimes of varying degrees, four are misdemeanors, and one is an infraction. *See supra* note 14.

101. *See, e.g.*, MO. ANN. STAT. § 191.677 (West 1997). Because broad statutes may be both vague and overbroad, *see* Closen, *supra* note 53, at 950–51, states should seek to draft statutes with specific, precise prohibitions such as the one found in the Appendix.

102. There are two issues with regard to proof of infection. The first, addressed in this section, involves the issue of when an individual has knowledge of his infection sufficient to consider his actions criminal. The second relates to evidence of infection that can be admitted at trial. It is in conjunction with this second area of HIV testing that disputes over the advisability of mandatory testing arise.

103. *Compare* MO. ANN. STAT. § 191.677(1) (West 1997) (providing that creating risk of infecting another with HIV is unlawful where the individual is "knowingly infected with HIV"), *with* ARK. CODE ANN. § 5-14-123(b) (Michie 1995) (providing that a "person commits the offense of exposing another to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus").

104. *See, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1995); NEV. REV. STAT. § 201.205 (1995); *see also* Appendix *infra* for Model Statute.

105. *See, e.g.*, GA. CODE ANN. § 16-5-60 (1997).

106. Even positive test results might not be challenged as failing to satisfy the knowledge requirement in some circumstances. For example, Nushawn Williams has claimed that, although he did receive positive test results when he was tested by the Chautauqua County

the statutory requirements. Is constructive knowledge sufficient? Generally, a person can be held to have constructive knowledge of a fact if the exercise of reasonable care would have revealed that fact to that person.<sup>107</sup> There are three scenarios that might be sufficient to establish constructive knowledge: symptoms, high-risk behavior, and a prior positive partner. However, the use of any of these three means for establishing constructive knowledge is ill-advised.

The first possibility for establishing constructive knowledge, the existence of symptoms, is unsatisfactory because in many cases the symptoms of HIV are similar to those of other common ailments such as the common cold or flu.<sup>108</sup> Nonetheless, at least in the civil context, the presence of symptoms may be enough to hold a defendant to constructive knowledge.<sup>109</sup> However, common symptoms such as weight loss, fatigue, fevers, night sweats, diarrhea, and enlarged lymph glands<sup>110</sup> are insufficiently distinctive to provide notice to the individual that he or she is infected with the HIV virus.<sup>111</sup>

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Health Department in August 1996, he did not believe that these results were accurate. *See* Barron, *supra* note 31, at A24. Instead, he believed that they were fabricated because officials were “just trying to get [him] out of town.” *Man With HIV Says Numbers Overstated*, DALLAS MORNING NEWS, Nov. 6, 1997, at A28.

In the civil context, positive test results constitute actual knowledge sufficient to establish a duty. *See, e.g.,* Maharam v. Maharam, 510 N.Y.S.2d 104, 107 (N.Y. App. Div. 1986).

107. *See* Schulman, *supra* note 7, at 987 (citing *Attoe v. State Farm Mutual Auto Ins. Co.*, 153 N.W.2d 575, 579 (Wis. 1967) (defining constructive knowledge as “that which one who has the opportunity, by the exercise of ordinary care, to possess”). It is possible to argue that persons who intentionally decline to determine their HIV-positive status can be imputed with that knowledge. *See* Closen, *supra* note 53, at 965. In other words, a person who deliberately avoids HIV testing, in the face of strong indications that he or she might be infected, might not be able to point to the lack of official notification of HIV-positive status as a lack of knowledge.

108. *See* Tierney, *supra* note 18, at 479.

109. *See* *Doe v. Johnson*, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993).

110. *See* Schulman, *supra* note 7, at 987 n.206.

111. Some cases of HIV do involve identifiable symptoms such as lesions which, at least when coupled with other things like long-term cold like symptoms or a history of high risk activity, could reasonably provide a warning that an HIV test is advisable. *See id.* at 987–88. Schulman proposes that constructive knowledge be deemed to exist where there are identifiable or long-term symptoms, especially when coupled with conduct carrying a high risk of transmittal in the absence of other possible medical explanations for the symptoms. *Id.* Under Schulman’s proposal, the existence of these factors should require an immediate HIV test and abstention from sexual or other activity with the possibility of transmittal of the virus until a negative result is obtained. *Id.* Schulman would also

An individual might also be held to have constructive knowledge that he is HIV-positive where he has engaged in high risk activities in the past. This is the most controversial of the three possibilities for constructive knowledge, as it looks not to actual warning signs but merely class wide identifications. For example, under this method, anyone who had ever engaged in anal intercourse might be deemed to have constructive knowledge of HIV-infection.<sup>112</sup> Because of the serious risk of prejudicial application, and the potential far-reaching coverage of such a definition of knowledge, prior high risk activities should not be considered to provide constructive knowledge of HIV-positive status.<sup>113</sup>

The final circumstance under which an individual might be held to have constructive knowledge of his or her HIV-infection is where that person is aware that a previous sexual partner has the HIV virus.<sup>114</sup> Establishing constructive knowledge by a prior sex partner's status is somewhat circular in the sense that it raises the question of what would establish knowledge of the other person's status. Is actual knowledge of positive results from a blood test necessary? This method of constructive knowledge would require an evidentiary showing that the person was informed of the prior partner's status. It also requires an individual to assume infection from a wide range of activities that might characterize someone as a prior sexual partner. Some of these activities might carry a very negligible risk of transmission.

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implement a "duty to investigate" in cases where even commonplace symptoms are coupled with a history of high risk behavior. *Id.*

While this proposal has the advantage of encouraging testing and responsible sexual behavior, it does not account for the potential unfairness of holding an individual responsible for knowledge that he or she does not actually have, especially in the case of an uneducated individual.

The model statute contained in the Appendix defines knowledge as actual knowledge of a positive test result, or as having been told by a medical doctor that symptoms suggest an HIV-infection and that HIV testing is advisable. This provision is designed to encourage testing and to minimize an individual's ability to avoid prosecution by refraining from obtaining actual knowledge through a positive test result.

112. For example, in one case, a Florida court held that a man's homosexual orientation and activity should be sufficient for the man to believe himself to be HIV-positive. *See Cooper v. State*, 539 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 1989).

113. *See Closen*, *supra* note 53, at 966.

114. *See Doe v. Johnson*, 817 F. Supp. 1382, 1391 (W.D. Mich. 1993). This language is criticized in Schulman, *supra* note 7, at 990, on the grounds that it is unclear whether a prior sex partner constitutes anyone with whom an individual has had some sort of sexual contact, or only those with whom vaginal intercourse has taken place. *Id.* Schulman would require testing of anyone who had engaged in vaginal, anal, or oral intercourse with an infected person. *Id.* Schulman's proposal is thus more of a mandatory testing proposal than one of constructive knowledge.



In a given case, some combination of symptoms, risk factors, and knowledge of direct exposure from an infected partner might provide sufficient evidence that the individual had knowledge beyond a reasonable doubt of his or her infection. However, the risk of allowing consideration of such variable factors is that they will be used prejudicially and arbitrarily. For example, a factfinder might determine that prior homosexual intimate conduct with the use of a precaution like a condom was nonetheless sufficient to provide constructive knowledge. Another factfinder might decline to find constructive knowledge where unprotected heterosexual intimate conduct was a part of the individual's history. For this reason, constructive knowledge should not be satisfactory to establish criminal culpability.

A good HIV transmission/exposure statute will be specific as to what constitutes knowledge. It will provide that only actual knowledge obtained from a test conducted on the individual's blood by medical or public health personnel, or strong indications from a doctor that testing is advisable because of tell-tale HIV symptoms,<sup>115</sup> will constitute knowledge sufficient to establish criminal culpability.

## 2. Prohibited Activity

Another area where specificity is valuable is in determining what activities are prohibited under the statute. Some statutes lay out very clearly the types of contacts that will suffice to establish criminal culpability, while others are not as precise.<sup>116</sup> Prohibited activities may include vaginal, genital, or anal intercourse, the sale or transfer of blood, sperm, tissue, organs, or plasma, and exchange of unsterile needles.

Because these statutes criminalize exposure, not merely transmission, it is important to specify what activities are prohibited.<sup>117</sup> Otherwise, the specter of possible prohibited activity looms too large. For example, could shaking hands constitute criminal conduct where both people's hands are sweaty?<sup>118</sup> What about an HIV-positive person who sneezes on someone accidentally? Does a pelvic exam by an obstetrician/gynecologist constitute "sexual penetration" under the statute?<sup>119</sup> A good statute will lay out in

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115. See Appendix *infra* for Model Statute.

116. Compare GA. CODE ANN. § 16-5-60(c) (1997) (providing detailed list of prohibited activities), with NEV. REV. STAT. § 201.205(1) (1995) (prohibiting engaging in "conduct in a manner that is intended or likely to transmit the disease").

117. See Tierney, *supra* note 18, at 498.

118. See Closen & Deutschman, *supra* note 26, at 592.

119. See Closen, *supra* note 53, at 952-53.

detail what conduct is prohibited, and will restrict prohibited conduct to that which actually poses the risk of transmitting the HIV virus.

Some of these provisions criminalize acts like biting or spitting. In some respects, biting cases do involve some of the most clear-cut HIV transmission cases because there is often evidence of the intent to transmit.<sup>120</sup> On the other hand, there are no documented cases of transmission from a bite, even where the skin has been broken.<sup>121</sup> Similarly, spitting has not been shown to have caused HIV-infection, as saliva contains very small quantities of HIV.<sup>122</sup>

Because there are no confirmed cases of HIV transfer from these activities, they should not be criminalized in HIV transmission/exposure laws.<sup>123</sup> While the common law doctrine of impossibility would not bar a conviction under most HIV transmission/exposure laws, the fact that it is medically impossible to transmit the virus through biting or spitting render these activities inappropriate for inclusion in HIV transmission/exposure laws.<sup>124</sup>

Some of these provisions would also criminalize the prenatal transfer of the HIV virus from a mother to a child.<sup>125</sup> Childbirth has one of the highest rates of

120. In many of the biting cases, there is evidence that the defendant verbalized his intent to transmit the virus. *See, e.g.*, *United States v. Moore*, 669 F. Supp. 289, 290 (D. Minn. 1987), *aff'd*, 846 F.2d 1163 (8th Cir. 1988) (noting that after the biting incident, "defendant stated that he intended to kill the officers"); *State v. Cummings*, 451 N.W.2d 463 (Wis. Ct. App. 1989) (upholding admission of evidence that defendant had stated his intent to transmit AIDS even though defendant did not have the disease).

In another case, where the defendant had "sucked up excess sputum" before biting a police officer, the court found sufficient evidence to sustain a conviction for aggravated assault with intent to commit murder. *Scroggins v. State*, 401 S.E.2d 13, 18 (Ga. Ct. App. 1990).

121. *See Tierney, supra* note 18, at 484.

122. *See id.* at 485.

123. In the right circumstance, a person could be prosecuted under a general criminal statute if his conduct did not fall within the state's HIV transmission/exposure law but nevertheless was criminal in nature. For example, in *United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988), the court affirmed the assault conviction of an HIV-positive inmate who bit two corrections officers, even though "the medical evidence in the record was insufficient to establish that AIDS may be transmitted by a bite." *Id.* at 1167-68. The court justified this result on the grounds that the jury was entitled to consider the defendant's mouth and teeth to be a deadly weapon even if the defendant was not HIV-positive. *Id.* at 1167.

124. However, prosecution should remain possible where appropriate under general criminal laws for the actual activity in which the individual has engaged, e.g., assault for a bite.

125. *See, e.g.*, ARK. CODE ANN. § 5-14-123 (Michie 1995). For a complete discussion of the subject of the criminalization of prenatal transfer of HIV, *see* Deborah A. Wiczorkowski Wanamaker, *From Mother to Child . . . A Criminal Pregnancy: Should*

transmission, ranging between twenty and fifty percent, as compared with a 1 in 500 risk of contracting the disease through sexual activity.<sup>126</sup> However, because transmission from mother to child occurs before birth as well as during birth, prenatal transfer should not be included within HIV transmission/exposure statutes because it would effectively bar HIV-positive women from bearing children despite the fact that they have a better than even chance of delivering a healthy baby.<sup>127</sup> Additionally, it might be used to prosecute women who discover they are HIV-positive after conception, thereby forcing women to obtain abortions so as to avoid criminal liability.<sup>128</sup> Furthermore, given that no contraceptive is foolproof in preventing pregnancy, criminalization of prenatal transfer might effectively require permanent abstinence. Finally, such a ban would logically have to be extended to couples with a high risk of passing a genetic disorder to a child. For these reasons, prenatal transfer should be exempted from inclusion in HIV transmission/exposure laws.

Breast-feeding, however, should be considered a prohibited activity. Although the risk of HIV transmission is slight, it is possible that the virus can be spread through breast milk.<sup>129</sup> Because there is a viable alternative to breast-feeding, namely the use of formula, the health of children should not be endangered by this activity.

### 3. Defenses — Consent and Condom Usage

Many HIV transmission/exposure statutes provide that consent is a defense to the crime.<sup>130</sup> In other words, if the defendant informed the victim that he or she was HIV-positive and the victim consented to participating in the sexual contact despite this fact, the defendant is not guilty of a crime. At least as to sexual conduct,<sup>131</sup> this is as it should be, because the goal of

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*Criminalization of the Prenatal Transfer of AIDS/HIV Be The Next Step In the Battle Against This Deadly Epidemic?*, 97 DICK. L. REV. 383 (1993).

126. See Closen, *supra* note 53, at 960–61.

127. On the other hand, the argument can be made that women should not have the right to bring numerous HIV-positive babies into the world, putting a huge stress on the health care system, and costing the public millions of dollars.

128. See Wanamaker, *supra* note 125, at 404.

129. See Closen, *supra* note 53, at 977–78 (citing Van de Perre et al., *Mother to Infant Transmission of Human Immunodeficiency Virus By Breast Milk: Presumed Innocent or Presumed Guilty*, 15 CLINICAL INFECTIOUS DISEASES 502 (1992)).

130. See, e.g., GA. CODE ANN. § 16-5-60 (1997); IDAHO CODE § 39-608(3)(a) (1997). Even those statutes that do not specifically establish consent as a defense may implicitly allow for such an argument to be raised. See Closen, *supra* note 53, at 945.

131. As to other activities such as needle sharing, consent should not necessarily be a defense. Consent is not even a consideration in the context of prenatal transfer, as a fetus is obviously unable to consent to the risk of infection.

criminal transmission/exposure provisions is to ensure that no unsuspecting person is exposed to the HIV virus without being given the opportunity to take precautions or to avoid the risk. The purpose of the laws is not to require an HIV-positive person to be abstinent for the remainder of his or her life. As Closen, et al., observed, society often allows participation in even dangerous activity when consent is given.<sup>132</sup>

A further issue is whether consent is an affirmative defense or whether absence of consent is an element of the crime that needs to be proven by the prosecution. Some statutes specifically provide that consent is an affirmative defense, thereby putting the burden on the defendant to prove consent.<sup>133</sup> Other statutes include lack of consent as an element of the offense, indicating that it is the prosecution's burden to prove absence of consent.<sup>134</sup> Many HIV transmission/exposure cases turn on the issue of consent, and thus the placement of the burden of proof may be dispositive.<sup>135</sup> Because the ramifications of falsely convicting a defendant are so serious, the burden of proving consent should not be shifted to the defendant, but rather should remain on the prosecution, as it does for other crimes, like rape, where consent is often the contested issue. Lack of consent is best seen as an element of the offense, not an affirmative defense.

In addition to consent, another potential defense is that the defendant used a condom when engaging in sexual contact, thereby preventing transmission of the disease.<sup>136</sup> A defendant might try to offer this as a defense even where no disclosure of infection was made. The advantage of allowing this as a defense is that HIV-positive individuals could preserve their privacy and confidentiality. The problem is that condoms are not

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132. See Closen, *supra* note 53, at 947-48.

133. See, e.g., IDAHO CODE § 39-608(3)(a) (1997) (stating: "It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity."). A Florida judge, in the course of sentencing an HIV-positive man to one year of probation for having sex with a minor, ordered the man, who had boasted about his active sexual lifestyle, to obtain written consent from partners before engaging in sex. See *Man With HIV Must Get Written Consent For Sex*, WASH. POST, Jan. 23, 1998, at A28.

134. See, e.g., ARK. CODE ANN. § 5-14-123(b) (Michie 1995) ("A person commits the offense of exposing another to human immunodeficiency virus if the person . . . exposes another . . . without first having informed the other person of the presence of the human immunodeficiency virus.").

135. See Closen, *supra* note 53, at 945.

136. A supplemental question is whether condom usage should be required of all sexual contact involving HIV-positive individuals.

infallible when it comes to preventing HIV transmission,<sup>137</sup> and so the use of condoms should not be able to suffice as a defense. In other words, the use of a condom should not replace the need to disclose HIV-positive status.

#### B. *Advantages of HIV Transmission/Exposure Laws*

In general, HIV transmission/exposure statutes have many advantages over generally applicable criminal laws as applied to HIV transmission and over public health related criminal and regulatory provisions. They are preferable in that they make prosecution easier and more successful, they offer better protection to society from HIV-transmitters, and they are more fair to the criminal defendant.

Because criminal HIV transmission/exposure does not require that the victim actually contracts the HIV virus, but rather that the defendant engages in an activity that puts the victim at risk of such transmission, many problems associated with the use of general criminal laws are avoided. For one, there is no need to prove that a victim contracted the HIV virus from the defendant, thereby avoiding difficult evidentiary issues involving the victim's other sexual contacts or potential sources of infection. Prosecution can be pursued immediately rather than only after HIV antibodies are detectable in a victim's blood. Thus, no lag in charging will exist. Also, unlike with murder or manslaughter, there is no need to wait for the death of the victim before charging or prosecution.<sup>138</sup>

Criminal transmission/exposure laws also allow legislatures to determine what the proper degree of punishment is for exposing another to HIV. These statutes can provide for punishment less strict than murder, which should be treated more harshly in light of the fact that it requires a showing of intent. On the other hand, punishment can be more severe than is provided for assault or reckless endangerment, which is appropriate because HIV exposure will often result in the death of the victim.

Guilt is also easier to establish than with general criminal offenses because there is no intent requirement. The defendant need not have wanted or planned to spread the HIV virus or even have thought about whether transmission may result from their actions. Because responsible behavior and conscious consideration of the risks of transmission on the part of HIV-

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137. "[C]ondoms are susceptible to breakage, spillage, seepage, defective workmanship, and improper usage." Schulman, *supra* note 7, at 986. Nonetheless, the risk of transmitting HIV from one sexual encounter with the use of a condom, assuming a 90% effective rate, is estimated to be 1 in 10,000. See Gostin, *supra* note 63, at 1022.

138. See Gostin, *supra* note 63, at 1042 n.129.

positive individuals is desirable, this aspect of HIV transmission/exposure laws benefits society.<sup>139</sup>

Another advantage to HIV transmission/exposure laws is that there is greater deterrent effect by having a specific statute.<sup>140</sup> Even absent a public prosecution of a criminal HIV exposure offender, the existence of an HIV specific statute on the books makes it clear to putative offenders that risky conduct will not be tolerated. Absent such a clear signal, some HIV-transmitters may not even be aware of the criminal nature of their conduct.

Not only is this advantageous to society because undesirable behavior will be deterred, it is also beneficial to those HIV-positive individuals who are engaging in conduct that puts them at risk of prosecution under a general criminal statute. While the illegality of uninformed sexual contact may not be apparent in a jurisdiction without an HIV transmission/exposure statute, a jurisdiction that does have such a law provides notice to HIV-positive individuals that they are at risk of being prosecuted if they engage in certain specified conduct. Thus a deterrent effect will be realized even if prosecutions are not more frequent or more successful than under general criminal laws, simply because of the public educational benefit of enacting an HIV transmission/exposure law.<sup>141</sup>

Potential defendants also benefit from the existence of an HIV transmission/exposure statute in the sense that it is less subject to prejudicial application.<sup>142</sup> Because the statute itemizes what conduct is prohibited, selective prosecutions are more apparent. In contrast, a prosecutor's decision to forgo prosecution against one individual under a general criminal statute while pursuing it against another may escape detection. At a minimum, the non-specific nature of a general criminal statute may allow the prosecutor to justify his actions. A specific law is, therefore, less arbitrary.

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139. In light of the fact that individuals are held responsible for realizing the dangers of transmittal through certain contact, medical and public health personnel should inform people of methods of transmission at the time that positive test results are given.

140. Some commentators have argued that this deterrent effect may not actually exist or that it is overstated. See, e.g., Closen & Deutschman, *supra* note 26, at 593.

141. Deterrence through education of the illegality of HIV exposure is especially significant because HIV-positive individuals, as a group, are likely to be less susceptible to deterrence than the general population because of their short life expectancy. Coupled with the increased likelihood that prosecutions will be successful under a transmission/exposure law, the tendency of many people to avoid criminal activity makes public education of the illegality of exposure an effective route to achieving deterrence.

142. See Closen, *supra* note 53, at 950.

### C. Disadvantages of HIV Transmission/Exposure Laws

Despite the many advantages of HIV transmission/exposure laws, there are some drawbacks.<sup>143</sup> The primary one is that there is the potential that the existence of such statutes may discourage individuals from getting tested.<sup>144</sup> Especially under a statute that provides for criminal culpability only where there is actual, and not merely constructive, knowledge of HIV-positive status, people may avoid receiving official notification of their infection so as to be able to engage in behavior which otherwise would be prohibited.<sup>145</sup> The model statute in the Appendix seeks to limit this problem by holding people responsible for knowledge where they have been told by a doctor that their symptoms may indicate HIV-infection and that they should be tested.

Another disadvantage of the use of HIV specific laws is that it raises issues with regard to the confidentiality of medical records. In their efforts to prosecute HIV transmission/exposure, prosecutors must obtain evidence that the defendant knew of his or her HIV-positive status. However, in some states such information is protected by confidentiality statutes that protect the defendant's medical records.<sup>146</sup> Even where not protected by statute, the preservation of confidentiality is of crucial importance in encouraging people to get tested. By the very act of prosecuting an individual for criminal HIV transmission/exposure, the state is disclosing that individual's HIV-infection.<sup>147</sup> Because of concerns about confidentiality, HIV transmission/exposure prosecutions should only be permitted where the crime is brought to the government's attention by a complaining witness or some other means outside the public health reporting system. The disclosure of confidential medical records in pursuance of a prosecution should be as

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143. Some of these issues can be resolved with a carefully drafted statute. See Appendix *infra* for Model Statute.

144. See Closen, *supra* note 53, at 964-65.

145. See *id.* at 967. One method of avoiding this problem is by providing for mandatory testing of certain individuals such as those accused of another crime. For discussion of the issues raised by mandatory testing provisions, see Michael P. Bruyere, *Damage Control for Victims of Physical Assault—Testing the Innocent for AIDS*, 21 FLA. ST. U. L. REV. 945 (1994).

146. See, e.g., COLO. REV. STAT. ANN. § 25-4-1404 (West 1998); OKLA. STAT. ANN. tit. 63, § 1-502.2 (West 1997). Some confidentiality statutes provide that prosecutors do have access to otherwise confidential test results. See *State v. Stark*, 832 P.2d 109, 112-13 (Wash. Ct. App. 1992) (interpreting WASH. REV. CODE ANN. § 70.24.105 (West 1992)).

147. In fact, an Illinois court held in *In re Multimedia KSDK, Inc.*, 581 N.E.2d 911 (Ill. App. Ct. 1991), that the Illinois confidentiality statute did not bar a television station from broadcasting the identity of an HIV-positive individual because she was a defendant in a case being pursued under Illinois' HIV transmission/exposure statute. *Id.* at 912.

limited as possible, and conducted in a manner designed to preserve the defendant's confidentiality.

It should be noted that confidentiality concerns are not reserved to prosecutions involving HIV-specific statutes. Any prosecution for exposing or transmitting the HIV virus may necessitate the disclosure of medical records. In fact, even where no prosecution takes place, issues of confidentiality may arise. For example, in order to publicize Nushawn Williams' HIV-positive status and the epidemic of HIV cases that were cropping up in Jamestown, New York, public health officials utilized a previously unused statute that permitted the disclosure of confidential HIV test records upon court order.<sup>148</sup>

Not only do these confidentiality provisions pose serious privacy issues with regard to HIV-transmitters, but they also may require disclosure of victims' private medical information.<sup>149</sup> It is possible that, in an effort to track the criminal activity of an HIV-transmitter, police and prosecutors may attempt to trace back exposure and transmittal of the disease through victims.<sup>150</sup> Where transmission has occurred, this infringement on privacy might even extend to other sexual partners of the victim in order to rule out other possible sources from which the victim might have contracted the disease.<sup>151</sup> However, the privacy of third parties is less likely to be infringed by HIV transmission/exposure prosecutions than by general criminal offense prosecutions, because a finding of guilt under a transmission/exposure law requires only exposure, not actual transmission, so the victim's HIV status is not a necessary piece of evidence.

Because HIV transmission/exposure crimes often arise in the context of intimate personal situations, constitutional privacy concerns are also

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148. N.Y. PUB. HEALTH LAW § 2785(2)(c) (McKinney 1997), which took effect in 1988, allows broad public disclosure of the identity of an infected person in cases of "clear and imminent danger to the public health." See Bill Alden, *Albany Begins Drive to Lift HIV Confidentiality*, N.Y.L.J., Dec. 1, 1997, at 1; Lynda Richardson, *Public Health Cited in Breaching H.I.V. Confidentiality*, N.Y. TIMES, Oct. 29, 1997, at B8. Statutes like this one are found in many states.

149. See Sullivan & Field, *supra* note 36, at 188-89.

150. *Id.*

151. See Tierney, *supra* note 18, at 488. However, in *Weaver v. State*, 939 S.W.2d 316 (Ark. Ct. App. 1997), the court declined to allow the HIV-positive defendant to ask questions relating to the victim's other sexual encounters. *Id.* at 318. The defendant, who had intercourse without disclosing his HIV-positive status despite the fact that he was informed that this would be a crime, was convicted under ARK. CODE ANN. 5-14-123 (Michie 1993), and sentenced to 30 years in prison. *Id.* at 317.



implicated.<sup>152</sup> However, the Supreme Court has recognized that states may regulate consensual sexual activity between adults.<sup>153</sup> Additionally, several courts have held, in various contexts, that privacy concerns can be trumped by the state's interest in public health.<sup>154</sup> At least one state court, the Supreme Court of Illinois, has upheld the constitutionality of its HIV transmission/exposure law in *People v. Russell*,<sup>155</sup> where it was challenged on First Amendment grounds.<sup>156</sup>

The existence of these criminal laws may also undermine efforts to extend treatment to all infected individuals. Many of these people are already hesitant to bring their disease to the attention of public health workers and medical personnel, and may go even further underground.

Finally, as with prosecutions under general criminal offense statutes, HIV transmission/exposure laws could be used discriminatorily against politically disfavored groups like homosexuals. Although selective prosecution is less likely under an HIV transmission/exposure law than under a general criminal statute, it is still a possibility. Even in states where sodomy is legal, the existence of HIV transmission/exposure laws might allow government agents to prevent such activity.<sup>157</sup> Not only is this discriminatory behavior unfair to those groups that are negatively impacted by it, but also it may be counterproductive to the overall goal of slowing the spread of the disease. Homosexuals, for example, may avoid obtaining testing and treatment for fear of being targeted for investigation and/or prosecution.<sup>158</sup> To minimize the potential for selective enforcement, HIV transmission/exposure laws should be drawn to limit prosecutorial discretion,<sup>159</sup> and the legislative histories of such laws should clearly indicate that the goal is to prevent prohibited conduct by all groups equally.

152. An individual's right to privacy in matters involving procreation and sexual activity was recognized in such cases as *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969), and *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

153. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

154. See, e.g., *Doe v. Roe*, 267 Cal. Rptr. 564, 568 (Cal. Ct. App. 1990) (noting that privacy right is "outweighed by the state's right to enact laws which promote public health and safety"); *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) (holding that the right of privacy is sometimes "subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy") (citing *Barbara A. v. John G.*, 193 Cal.Rptr. 422, 430 (Cal. Ct. App. 1983)).

155. 630 N.E.2d 794 (Ill. 1994).

156. *Id.* at 795-96.

157. See *Tierney*, *supra* note 18, at 488-89.

158. See *id.* at 489.

159. One method for limiting prosecutorial discretion is for the statute to permit enforcement only upon a victim's request to law enforcement authorities. See *id.* at 512. This

## IV. CONCLUSION

Despite the disadvantages discussed above, an HIV transmission/exposure law should be passed and utilized in every jurisdiction because it best ensures that those individuals who expose others to a fatal disease will be held responsible for their actions. HIV is a fatal disease, one which is currently both unpreventable and incurable. Without the use of HIV transmission/exposure laws, many Americans will be exposed to the disease, both by those who do not know that exposure is illegal and by those who do not care. Many of these people will contract the disease and die. Simply by adopting HIV transmission/exposure laws, the message will spread, hopefully faster than the disease itself, that society considers HIV exposure to be unacceptable behavior. And where prosecution is nonetheless necessary, use of the laws will offer prosecutors an increased likelihood of success, but only in those cases where prosecution is truly warranted.

To be certain, the effort to prosecute HIV-transmitters and expositors will necessitate some infringement on confidentiality and privacy. However, this disadvantage, while significant, should not deter the enactment of HIV transmission/exposure laws. The same criticism applies to general criminal laws, perhaps to an even greater extent, as HIV transmission/exposure laws do not require proof of actual transmission and offer better protections against discriminatory enforcement. When balanced against the certainty of death if the HIV virus is spread to uninfected individuals, the interests of confidentiality and privacy must be trumped.

The model statute contained in the Appendix seeks to capture the benefits of HIV transmission/exposure laws while minimizing their disadvantages. Specifically, it provides clear definitions of what constitutes knowledge, what activities are and are not prohibited, what will be considered a defense to the crime, and when the statute should be utilized. This HIV law is superior to general criminal laws because it provides notice to potential defendants, reinforces societal norms against dangerous behavior, deters individuals from engaging in such behavior,<sup>160</sup> and punishes those who do so anyway.

Nushawn Williams might not have engaged in unprotected intercourse with so many women had he known that such activity was illegal. And if he

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limitation is not without downsides of its own, most notably that it permits or perhaps even encourages people to threaten former or current partners with the prospect of punishment. The remedies for this concern, which is by no means exclusive to transmission/exposure laws, is merely a careful prosecutorial screening process and the placement of the burden of proof for all elements of the crime, including lack of consent, on the prosecution.

160. *See id.* at 486–87.

had nevertheless done so, prosecutors in New York would have a much greater chance to get a conviction and to put him in prison for his despicable actions. While punishing Mr. Williams will not give his victims back the lives he allegedly took, it will help treat the disease that afflicts America today: the willingness of some HIV-positive individuals to expose others to a fatal disease. HIV transmission/exposure laws cannot cure our nationwide problem of HIV transmission and the difficulties of punishing and deterring it, but until a medical cure for HIV is found, HIV transmission/exposure laws are the best options we have available.

## V. APPENDIX — MODEL STATUTE

## Sec. 1 — Criminal HIV transmission/exposure.

A. A person is guilty of the crime of HIV transmission/exposure when that person has knowledge that he or she is infected with the HIV virus and exposes another person to that virus without the consent of that other person.

B. Violation of Sec. 1.A is a class B felony, punishable by [insert incarceration term consistent with that of other offenses].

C. Prosecution for conduct that constitutes exposure under this Section precludes prosecution under any other Section of the State Code for the same conduct.

D. Definitions to be applied to Sec.1.A.:

1. “Knowledge” means that the person has been informed by a medical or public health official, including but not limited to a doctor, nurse, health department worker, or designated representative of a home HIV testing company licensed by the Federal Food and Drug Administration (“FDA”), that his or her blood tests positive for the antibodies indicating that he or she is infected with the HIV virus; or that the person has been informed by a medical doctor both that he or she has symptoms indicating the possibility that he or she has been infected with HIV and that he or she should obtain an HIV test to confirm or disprove this potential diagnosis.

Prosecution under this Section shall not proceed in the absence of knowledge of HIV infection as herein defined.

2. “Infected with the HIV virus” means that the person has the Human Immunodeficiency Virus (“HIV”), Acquired Immune Deficiency Syndrome (“AIDS”), or any related virus or syndrome such as AIDS-Related Complex.

3. “Exposes” means that the person engages in one of the following types of conduct, and no other type of conduct:

a. Sexual activity consisting of any direct contact between the mouth, tongue, genitals, or anus of one person and the genitals or anus of another, regardless of whether condoms or other protective measures are utilized.

b. Exchange, donation, sale, or any other type of transfer to another individual of a drug needle or syringe that has been utilized by the HIV-infected individual for injecting a substance or otherwise piercing his or her skin and has not subsequently been sterilized.

c. Donation, sale, gift, or any other type of transfer to another person or entity of the tissues, blood, organs, semen, breast milk, or other bodily substance for the purposes of transplantation, transfusion, insemination, or feeding. Transfer of bodily substances to medical professionals for the purpose of testing or medical research shall not constitute prohibited conduct under this Section, nor shall in utero transmission from a mother to a child constitute prohibited conduct under this Section.

4. "Consent" means that a person over the age of majority has disclosed his or her HIV-positive status to the other person and that other person has affirmatively agreed to participate in the conduct constituting exposure under Section 1.D.3. Agreement by a minor to participate in the conduct constituting exposure does not constitute consent. The prosecution bears the burden of proving lack of consent.

5. A person is guilty of criminal HIV transmission/exposure if Section 1.A. is satisfied, regardless of whether or not actual transmission has taken place.

#### NOTES AND HISTORY

The purpose of this section is to prohibit conduct that has the potential of transmitting the HIV virus. As such, it has been drawn to specifically delineate the conduct that constitutes criminal behavior and to exclude types of conduct, such as biting or spitting, which do not have the capacity to transfer the virus.

It is the goal of the legislature that this section will be applied evenly against all types of people and that it will not be used selectively against certain groups. As such, prosecutors should use careful discretion when applying this section in the absence of a complaint from a victim.

Additionally, this section does not circumvent or in any way alter the provisions of the state's confidentiality statute. Prosecutors must adhere to the provisions laid out in that section of the state code and should take every precaution to preserve the confidentiality of offenders and victims alike.

# All “Pushers” Are Not Created Equal! The Inequities of Sanctions for Physicians Who Inappropriately “Prescribe” Controlled Substances

Sharon B. Roberts\*

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## I. INTRODUCTION

It is estimated that at least seven million people regularly use prescription drugs without medical supervision, the majority of which are addictive.<sup>1</sup> This led to a 1983 figure of \$60 billion to treat drug abuse in the United States.<sup>2</sup> Who is watching the licensed practitioners who serve as the gatekeepers of these drugs?

Licensed health care professionals are governed in their practice by a maze of incongruent rules and regulations. The administrative agency (“Board”) in the state where the professional is licensed has authority to sanction the licensee for inappropriate behavior.<sup>3</sup> In addition to Board

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1. Drug and Alcohol Abuse Treatment, Pub. L. No. 99-570, 100 Stat. 3207-160(a)(2) (1986) (codified at 21 U.S.C. 801 (1994), Historical and Statutory Notes).

2. *Id.* at 3207-160(a)(4).

3. In Florida, the state administrative agency for physicians is the Board of Medicine at the Agency for Health Care Administration, Tallahassee, Florida (“Board”). The Board’s disciplinary actions follow the Florida Medical Practice Act, FLA. STAT. §§ 458.327, 329 (1997). They follow the court proceedings of the Administrative Procedures Act, FLA. STAT. §§ 120.57(1), (2) (Supp. 1998), and the sentencing guide of FLA. ADMIN. CODE (1999) (formerly FLA. ADMIN. CODE 59 r. 8.001).

penalties, a health care professional who violates federal or state law in the course of her practice may also be governed by the respective criminal laws.<sup>4</sup> Although an abundance of enthusiastic legislation is available for use in regulating licensed practitioners, when applied, these laws lead to inconsistent, unforeseeable, and usually insufficient punishments in comparison to the culpability of the professional's actions.

Generally when a health care professional prescribes or dispenses controlled substances inappropriately, a criminal investigation of the suspected individual will begin. The state prosecutor then has the responsibility to recognize the individual as a licensed health care professional and report the criminal charge to the Board. Theoretically, the criminal trial and state administrative proceeding run concurrently and may result in dual judgments. However, professional culpability could be overlooked if the prosecutor either neglects to inform the administrative agency or the practitioner holds a license to practice in more than one state and the prosecutor errs by only reporting to the state agency in which the practitioner was currently working when criminally charged.

Statutes vary among the states and this note is therefore limited to an exploration of the inequities of sanctions of cases in Florida. In addition, federal rules that govern physicians who inappropriately prescribe controlled substances in Florida will be reviewed.<sup>5</sup> Part II reviews the legislative history of the statutes that govern physician prescribing. Part III weighs criminal charges and defenses. Part IV reviews civil liabilities. In conclusion, Part V provides an illustration of the inequities of sanctions towards the more fortunate professional as compared to nonprofessional defendants.

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4. In Florida, the State Attorney General is responsible for criminal charges under the Florida Comprehensive Drug Abuse Prevention and Control Act, FLA. STAT. § 893 (Supp. 1996) (amended at 21 U.S.C. § 841 by the Controlled Substance Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970), and the United States Sentencing Guidelines, § 2D1.1 (1998) ("Guidelines"). If there is ever a conflict in these rules, the statutes prevail over the Guidelines.

5. This note only reviews cases involving validly licensed physicians. Controlled substances, for purposes of this note, are prescription drugs including narcotics found in schedules II-IV of the Drug Abuse Prevention and Control Act, FLA. STAT. § 893.03 (Supp. 1996), having a recognized medical use. For a review of pharmacist liabilities see, for example, P.G. Guthrie, Annotation, *Revocation or Suspension of License or Permit to Practice Pharmacy or Operate Drugstore Because of Improper Sale or Distribution of Narcotic or Stimulant Drugs*, 17 A.L.R. 3d 1408 (Supp. 1998). For a review of nursing liability see, for example, Emile F. Short, Annotation, *Revocation of Nurse's License to Practice Profession*, 55 A.L.R. 3d 1141 (Supp. 1998).

## II. LEGISLATIVE HISTORY

The first Congressional attempt to regulate both the distribution and marketing of dangerous drugs was the Pure Food and Drug Act of 1906,<sup>6</sup> which was likewise repealed in 1938.<sup>7</sup> In 1914, two attempts at regulation were passed. The Harrison Act,<sup>8</sup> which was repealed in 1970,<sup>9</sup> and the Narcotic Drugs Import and Export Act,<sup>10</sup> which was repealed in 1970. Finally, in 1970, Congress repealed all prior federal drug control legislation and enacted the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Act").<sup>11</sup> Title II of the Act is the Controlled Substance Act.<sup>12</sup> Fourteen years later, the Comprehensive Crime Control Act of 1984 was passed to revise the Act, thereby allowing stricter penalties for violating narcotics laws.<sup>13</sup> The idea behind the combination Act, as stated by the United States Supreme Court in a 1975 case against a physician, was to create uniformity between the state and federal laws, thereby enabling more effective communication in the war against drugs and less subjective sanctions.<sup>14</sup>

The Act requires all persons who manufacture and distribute controlled substances to register with the Attorney General of the United States.<sup>15</sup> Physicians who prescribe controlled substances and who fail to register are subject to criminal penalties under section 822 and 841(a)(1) of the *United*

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6. Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938), primarily created to prevent interstate commerce of adulterated drugs.

7. *Id.*

8. Pub. L. No. 63-223, 38 Stat. 785 (repealed 1970).

9. *Id.*

10. Pub. L. No. 63-230, 38 Stat. 275 (repealed 1970).

11. 21 U.S.C. §§ 801-901 (1970) [hereinafter *Act*].

12. 21 U.S.C. § 801.

13. The Comprehensive Crime Control Act of 1984 revised the Act of 1970 to allow real property in the scope of civil forfeiture. 21 U.S.C. § 881(a)(7) (1988). See, e.g., M. Lynette Eaddy, *How Much is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. LAW REV. 709 (1993).

14. *United States v. Moore*, 423 U.S. 122 (1975). In *Moore*, it was argued that a registered physician cannot be prosecuted under section 841 because section 841, which carries much harsher penalties, is reserved for an individual "outside the 'legitimate distribution chain.'" *Id.* at 130. Other sections such as sections 842 and 843, which are more lenient were proffered as the correct avenue of prosecution. *Id.* at 131. The Court held that section 841 is applicable when the activities fall outside the normal course of professional medical practice and congressional intent is not to set up distinct sections for punishment of differing classes of individuals. *Id.* at 124, 132. Moore was charged under 21 U.S.C. § 841(a)(1) with the unlawful distribution of methadone, a schedule II narcotic. *Id.* at 124.

15. 21 U.S.C. § 822 (1994).



*States Code*.<sup>16</sup> Under the Act, physicians are also required to keep records of controlled substance distribution.<sup>17</sup> Failure to comply with the Act can result in criminal sanctions.<sup>18</sup> In *United States v. Betancourt*,<sup>19</sup> the court explained that once registered with the Drug Enforcement Administration ("DEA"), the physician is required to prescribe controlled substances in the usual course of professional practice and for legitimate medical purposes.<sup>20</sup> The Act defines "dispense" as "to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner, including the prescribing, . . . administering[,] . . . packaging, labeling or compounding" of a controlled substance.<sup>21</sup> "Dispense," therefore, connotes a lawful order. If a physician unlawfully prescribes a controlled substance he has not dispensed under this statute, he has "distributed" in violation of law.<sup>22</sup>

In addition to the Act, there are parallel state administrative rules imposed by the medical licensing board that could result in physician liability.<sup>23</sup> The Board has been empowered to discipline a licensee by suspending or revoking the practitioner's license, by reprimand, or by fine.<sup>24</sup>

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16. See *United States v. Blanton*, 730 F.2d 1425 (11th Cir. 1984), which involved a physician's refusal to register in order to dispense Schedule II N drugs, which included methaqualone. *Id.* at 1427. The Court explained that:

To possess or dispense a controlled substance, doctors must be licensed to practice medicine and register annually with the Drug Enforcement Administration (DEA). 21 U.S.C.A. § 822. Doctors may acquire and dispense controlled substances "to the extent authorized by their registration."

*Id.* § 822(b). The registration application contains a separate box denoting each schedule and directs applicants to check each box which is applicable in registering for desired schedules. The statute mandates that the DEA register physicians in every schedule they check if the physicians are authorized by state law to dispense the substances included in that schedule.

*Id.* at 1427 n.1.

17. 21 U.S.C. § 830 (1994).

18. 21 U.S.C. § 841 (1994) (quoting 21 U.S.C. § 822).

19. 734 F.2d 750 (11th Cir. 1984).

20. *Id.* at 757. In *Betancourt*, the court reasoned that prescribing methaqualone excessively, without further medical inquiry, is in violation of section 841 as not a legitimate medical purpose. *Id.* at 757.

21. 21 U.S.C. § 802(10) (1996).

22. *United States v. Black*, 512 F.2d 864, 866 (9th Cir. 1975).

23. TIMOTHY S. JOST ET AL., *Consumers, Complaints, and Professional Discipline: A Look at Medical Licensure Boards*, 3 HEALTH MATRIX 309, 330 (1993); The Medical Practice Act, FLA. STAT. § 458 (1993).

24. Jost, *supra* note 23. This note will only look at section 458.331(1) of the *Florida Statutes*:

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.

Once the Board decides to cite a physician for misconduct, the case becomes public record.<sup>25</sup> Formal disciplinary sanctions must be initiated by citation, thereby placing the physician's reputation on the line.<sup>26</sup> The Board's final decision to cite a physician is a reflection of the serious nature of the offense.<sup>27</sup> In an Ohio study of 200 complaints lodged against physicians, only five (2.5%) resulted in formal disciplinary action by citation.<sup>28</sup> Potential concurrent liability of a practitioner under the numerous Board rules and inconsistent criminal statutes has led to much controversy and confusion, leaving the practitioner with ripe arguments focused on constitutional invasions, legislative intent, and statutory interpretations.

### III. CRIMINAL LIABILITY

Many criminal defenses for physicians are founded in the area of statutory interpretation. For example, section 893.13(1)(a) of the *Florida Statutes* uses the word "selling" to define the criminal act of dispensing controlled substances.<sup>29</sup> In the case of *Cilento v. State*,<sup>30</sup> a physician, Cilento, dispensed controlled substances by means of a prescription issued in bad faith, not in the course of medical practice.<sup>31</sup> He claimed his actions were "prescribing" and not "selling," therefore, not in violation of the Act, which expressly requires selling of a controlled substance for sanctions.<sup>32</sup> The court held that prescribing in bad faith is "selling" through statutory interpretation.<sup>33</sup>

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(q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

FLA. STAT. §§ 458.331(1)(c), (q) (Supp. 1998).

25. Jost, *supra* note 23 at 326.

26. *Id.* at 327.

27. *Id.* at 330.

28. *Id.*

29. FLA. STAT. § 893.13(1)(a) (1997).

30. 377 So. 2d 663 (Fla. 1979).

31. *Id.* at 664.

32. *Id.* at 666.

33. *Id.*

Therefore, a physician who is alleged to have prescribed a controlled substance in violation of the Act can only be found criminally liable if the prescriptions were written in bad faith.<sup>34</sup> Bad faith can be proven when the prescribing was done in opposition of proper medical standards.<sup>35</sup> However, it should be noted that nonconformity to the standard medical practice is only evidence in support of bad faith and must further be proven by medical expert testimony.<sup>36</sup> The burden of going forward with evidence to challenge the Act and establish an exception or exemption to the Act rests with the defendant.<sup>37</sup> This must be distinguished from the burden of persuading the jury beyond a reasonable doubt that the defendant did commit the crime, as this burden always remains with the prosecution.

By contrast, other courts have held that a physician could not be prosecuted for selling controlled substances when the physician has prescribed the drugs to another.<sup>38</sup> These courts stated that the term "selling" did not adequately describe the physician's action of prescribing within the course of patient treatment.<sup>39</sup> In *Ex parte Evers*,<sup>40</sup> when the physician prescribed amphetamines to a patient for alleged fatigue, it was found that while the statute could apply to a licensed practitioner, the issue was whether it is applicable to a physician who writes a prescription in the course of practice.<sup>41</sup> In reaching its holding, the court stated that the criminal statutes are to be strictly construed in a light most favorable to the defendant.<sup>42</sup> Testimony, in this case, could not establish the actual selling of pills by the physician under the statutory construction, and the statute should not be extended by construction.<sup>43</sup> Statutory interpretation varies among the districts making conclusions of law difficult to ascertain.

A license to practice medicine is the basic requirement to prescribe substances that may be otherwise illegal. A license does not, however, protect the physician from state intervention by the police. In *United States v. Moore*,<sup>44</sup> a licensed physician argued that he could not be prosecuted

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34. *Id.*

35. *Cilento*, 377 So. 2d at 666.

36. 21 U.S.C. § 885(a)(1) (1970).

37. *Id.*

38. *Ex parte Evers*, 434 So. 2d 813 (Ala. 1983), *rev'd*, 434 So. 2d 817 (Ala. Crim. App. 1983). See also *Rudell v. State*, 453 So. 2d 1329 (Ala. Crim. App. 1984) (holding statute does not apply to a licensed physician who writes a prescription within the scope of his registration).

39. *Evers*, 434 So. 2d at 816.

40. 434 So. 2d at 813.

41. *Id.* at 816.

42. *Id.*

43. *Id.* at 816-17.

44. 423 U.S. 122 (1975).

under the federal Act<sup>45</sup> for distribution or dispensing a controlled substance because he was acting within his professional practice.<sup>46</sup> The Court disagreed, holding that Congress did not intend two separate and distinct penalty systems, one for a licensed physician and the other for a “pusher.”<sup>47</sup> The Court stated that the defendant was exempt under section 841(a)(1) of the *United States Code* from only the legitimate dispensing of controlled substances.<sup>48</sup> There was nothing in the statute to infer that a registrant is exempt from prosecution when he acted like a “pusher” outside of the usual course of professional practice.<sup>49</sup>

Additionally, statutory interpretation has uncovered the fact that prescribing controlled substances constitutes a “delivery” if such act of prescribing could be reasonably contemplated to result in actual transfer to the patient by a pharmacist.<sup>50</sup> Delivery is defined by the Florida Comprehensive Drug Abuse Prevention and Control Act to include constructive and attempted transfers as well as actual delivery.<sup>51</sup>

In the case of *Felker v. State*,<sup>52</sup> the physician argued he was permitted to carry cocaine and admitted to having more at his medical office when he was found to have cocaine residue in a nasal spray bottle, on a straw, and a knife.<sup>53</sup> A search of his office revealed three bottles of cocaine hydrochloride, a schedule II controlled substance, in his personal desk drawer.<sup>54</sup> The court stated that the Act makes it unlawful for any person to have possession of any controlled substance in a “carte blanche” fashion.<sup>55</sup> The court further stated that allowing physicians to possess controlled substances for their own personal, nonmedical use, was not the legislature’s intention.<sup>56</sup> However, in this case, despite the drug residue evidence, the physician was found not guilty because there was not enough evidence to prove he was in actual possession of the drug at the time of the arrest.<sup>57</sup> This case demonstrates that the statutory authority is available to convict

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45. 21 U.S.C. § 841(a)(1) (1970).

46. Moore, 423 U.S. at 131.

47. *Id.* at 132.

48. *Id.* at 138.

49. *Id.*; see also *United States v. Steele*, 105 F.3d 603 (11th Cir. 1997) (extending violations from physicians to pharmacists).

50. *State v. Vinson*, 298 So. 2d 505, 507 (Fla. 2d Dist. Ct. App. 1974).

51. *Id.*; FLA. STAT. § 893.02(5) (1997).

52. 323 S.E.2d 817 (Ga. App. 1984).

53. *Id.* at 819-20.

54. *Id.* at 820.

55. *Id.*

56. *Id.*

57. *Felker*, 323 S.E.2d at 821.

physicians criminally, but the professional seems to elude the law with loopholes.

### A. *Constitutional Challenge*

The Act has been challenged by criminally charged physicians on constitutional grounds. These grounds have included vagueness, invasion of Tenth Amendment residual state police powers, right to privacy in the physician/patient relationship, due process, and cruel and unusual punishment. Historically, statutory challenges based on constitutional grounds have been unsuccessful. As early as 1914, contentions that statutory terms, such as "legitimate use," were void for vagueness, were without success.<sup>58</sup> The court held, in *Commonwealth v. Gabhart*, that the mere fact that "legitimate use" remained undefined by the statute, did not warrant finding the statute void for vagueness.<sup>59</sup>

Another unsuccessful constitutional argument arose when the Department of Professional Regulation ("DPR") performed a warrantless, routine administrative search of a pharmacy and found suspect prescriptions for Quaaludes (methaqualone) written by an oral surgeon.<sup>60</sup> The surgeon attacked the constitutionality of the search as a violation of his reasonable expectation of privacy.<sup>61</sup> The court found that the physician had no grounds for attacking the constitutionality of the search and upheld the physician's thirty-day suspension.<sup>62</sup>

Vagueness has also failed as a constitutional argument. The good faith standard of section 893.05(1) of the *Florida Statutes* states that a licensed physician, in the course of his practice, may prescribe, mix, dispense, and administer controlled substances.<sup>63</sup> When a physician wrote a prescription for a patient, subsequently found not written in "good faith," he challenged this clause as unconstitutionally vague.<sup>64</sup> The Supreme Court of Florida held that the statute is not unconstitutionally vague because it passed the test that "men of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>65</sup>

In controlled substances cases, even where the suspected physician is visited by undercover agents posing as patients, the defense has not been

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58. *Commonwealth v. Gabhart*, 169 S.W. 514 (Ky. Ct. App. 1914).

59. *Id.* at 516.

60. *Cushing v. Department of Prof'l Reg.*, 416 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1982).

61. *Id.* at 1198.

62. *Id.*

63. FLA. STAT. § 893.05(1) (1997).

64. *State v. Weeks*, 335 So. 2d 274, 276 (Fla. 1976).

65. *Id.* at 276.

successful. It has been established that these actions by undercover agents are not grounds for suppression of evidence, although entrapment has been a successful defense.<sup>66</sup> The key to entrapment is to determine if the undercover agents induced the defendant to act, or if the defendant was predisposed, and was merely given the opportunity to do so.<sup>67</sup> If a predisposition to act can be established, entrapment may fail.<sup>68</sup>

Other states have challenged other aspects of the Act on constitutional grounds, without avail.<sup>69</sup> Typically, a physician who is indicted for unlawfully prescribing a controlled substance is more likely to prevail if the defense avoids the constitutional issues and focuses on weak construction and interpretation of the Act.

#### B. *Criminal Charges: Double Jeopardy?*

Physicians' actions are investigated both criminally and by a board, thus arguments have arisen that findings of the board are final, collaterally estopping the prosecution from proceeding.<sup>70</sup> The argument that the state is estopped from prosecuting the defendant is usually rejected. In the case of *State v. Fritz*,<sup>71</sup> the court explained that the doctrine of collateral estoppel does not apply because there is a lack of privity between the State Attorney's office and the state's administrative department.<sup>72</sup>

In 1989, the United States Supreme Court faced the issue of whether and when a civil penalty is considered punishment for the purpose of double jeopardy.<sup>73</sup> In *United States v. Halper*,<sup>74</sup> Halper was working as a manager of a medical laboratory and submitted sixty-five false claims to Blue Cross

66. *White v. State*, 247 S.E.2d 536, 538 (Ga. App. 1978).

67. *Id.*

68. *Id.*

69. In *United States v. Rich*, 518 F.2d 980 (8th Cir. 1975) (Missouri), the court found the failure to delineate parole terms not vague. *Id.* at 986. In *United States v. Atkinson*, 513 F.2d 38 (4th Cir. 1975) (North Carolina), the court held a 12-year sentence does not violate the Eighth Amendment as unusual or excessive punishment. *Id.* at 42. "[I]n the course of professional practice" was held not void for vagueness under the Fifth Amendment; further, the Act, as applied to physicians, does not violate the Tenth Amendment by invading state police powers. *United States v. Collier*, 478 F.2d 268, 271 (5th Cir. 1973) (Georgia); *United States v. Rosenberg*, 515 F.2d 190, 193 (9th Cir. 1975) (California).

70. *State v. Fritz*, 527 A.2d 1157 (Conn. 1987).

71. *Id.* at 1157.

72. *Id.* at 1166.

73. *United States v. Halper*, 490 U.S. 435 (1989). See U.S. CONST. amend. V: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

74. *Halper*, 490 U.S. at 435.

and Blue Shield.<sup>75</sup> Blue Cross mistakenly paid the claims and passed the charges over to the Federal Government Medicare division.<sup>76</sup> Halper was convicted on sixty-five counts of violating the criminal false claims statute, imprisoned for two years, and fined \$5000.<sup>77</sup> The Government then brought Halper up on charges of violating the Civil False Claims Act,<sup>78</sup> and fined him \$130,000.<sup>79</sup> The district court held that due to Halper's criminal conviction, an additional civil punishment of \$130,000, when actual damages were significantly smaller, would amount to double jeopardy.<sup>80</sup>

The Government argued on appeal that double jeopardy only applies when the second punishment is also criminal.<sup>81</sup> The Court reasoned that punishment for the purposes of double jeopardy can be both criminal and civil.<sup>82</sup> Civil judgments can impose punitive damages that far exceed remedial goals and therefore serve punishment purposes.<sup>83</sup> The court held, that under the Double Jeopardy Clause, if a defendant has already been punished criminally, he may not be subjected to a civil sanction for the same offense if the civil penalty is retributive and not remedial in nature.<sup>84</sup> The civil punishment of \$130,000 was found to violate the Double Jeopardy Clause and the case was remanded for adjustment to a remedial amount.<sup>85</sup>

The finding in *Halper* clouds the seemingly bright line of double jeopardy. An assessment must be made of whether the completeness of the punishment under one statute is a potential bar to liability under another applicable statute. When it comes to a physician, where is that line drawn? Who decides if a simple suspension of a medical license accompanied by a fine is adequate "punishment," thereby barring criminal sanctions? This note by no means purports to answer these questions, but attempts to bring these issues to the forefront for examination.

In 1996, in *Borrego v. Agency for Health Care Administration*,<sup>86</sup> a case of first impression in Florida, a physician was previously convicted of federal Medicare fraud, then using some facts of this underlying conviction, he was later subjected to a licensure suspension by the Board.<sup>87</sup> The court

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75. *Id.* at 437.

76. *Id.*

77. *Id.*

78. 31 U.S.C. §§ 3729-3731 (1994).

79. *Halper*, 490 U.S. at 437.

80. *Id.* at 438.

81. *Id.* at 441.

82. *Id.* at 448.

83. *Id.*

84. *Halper*, 490 U.S. at 448-49.

85. *Id.* at 452.

86. 675 So. 2d 666 (Fla. 1st Dist. Ct. App. 1996).

87. *Id.* at 667.

held the suspension did not constitute double jeopardy.<sup>88</sup> This holding was based on the much accepted reasoning that disciplinary actions of the state Board are designed to protect public welfare rather than punish the individual.<sup>89</sup> Although this recent case is promising in that, as Congress intended, crimes are not going without dual sanctions, the civil sanctions imposed on the physician in Borrego were only a \$5000 fine and a suspension of his license for eighteen months.<sup>90</sup> What if the physician had received a license revocation or imprisonment previously, would this have been civil "punishment" enough to constitute double jeopardy for the second offense?

Another avenue the prosecution may take is that of the Dual Sovereignty Doctrine. This doctrine allows successive state and federal prosecutions for the same crime.<sup>91</sup> However, this avenue, although supported by the United States Supreme Court, is littered with as much, if not more, controversy than double jeopardy, and outside the scope of this note.<sup>92</sup>

#### IV. CIVIL LIABILITY AND AN ADMINISTRATIVE CASE REVIEW

State Boards' investigations of physicians originate from two primary sources: Letters or telephone calls from patients, relatives, or friends complaining of mismanaged care or inappropriate conduct; other notices from hospitals, insurance companies, and similar entities, as well as criminal convictions and similar information.<sup>93</sup> When an action is taken and a physician's license is revoked or suspended by the Board for inappropriately prescribing a controlled substance, the cases can generally be divided into two categories. The first category involves the practitioner that has been

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88. *Id.*

89. *Id.* at 668. *See also* *Helvering v. Mitchell*, 303 U.S. 391, 399 n.2 (1938); *Munch v. Davis*, 196 So. 491, 493-94 (Fla. 1940). "The purposes of the imposition of discipline are to punish . . . deter [and] rehabilitate." FLA. ADMIN. CODE ANN. r 8.001 (1997).

90. Interview with David Osterhouse, Regulation Specialist II, Office of the Agency Clerk, Agency for Health Care Administration, Tallahassee, Fla., *Board of Medicine Final Orders Involving Improper Prescribing or Criminal Convictions* (March 14, 1997).

91. Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C.L. REV. 1159, 1162 (1994).

92. *Id.* Dual sovereignty is supported by the United States Supreme Court. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 91-94 (1985); *United States v. Wheeler*, 435 U.S. 313, 332 (1978).

93. Jost, *supra* note 23, at 310-11. The number of complaints and referrals to the state medical licensing boards has been increasing. *Id.* The number of complaints has almost doubled in eight years, ranging recently from 5000 to 7000 per year. *Id.*



convicted of a prior criminal offense in the course of medical practice.<sup>94</sup> The second category involves those practitioners that are charged solely under the rules of the administrative agency.<sup>95</sup>

Based on information acquired from Florida's Agency for Health Care Administration, 109 physicians have been cited under the state's administrative agency rules between January 1992 to December 1996.<sup>96</sup> Ideally, the criminal proceeding is instituted or the criminal judgment reached before the administrative proceeding begins. However, it has been acknowledged that the Board may actually begin the investigation in some cases and subsequently report the alleged criminal violations to the state attorney.<sup>97</sup> Additionally, it is well known that few proceedings ever reach the courts. Cases not published in the reporters or available in electronic databases are not reflected in this summary. Also, given that in a license revocation or suspension proceeding, the hearing officer's findings of fact need be based only on "competent substantial evidence," the civil charges may be dropped under certain circumstances upon termination of the criminal proceeding.<sup>98</sup>

Since the authority to revoke or suspend a physician's license for inappropriate prescribing of controlled substances is vested in an administrative agency—in Florida, the Florida Board of Medicine—the courts generally defer to the agency. Findings are generally affirmed unless they are excessively harsh, shocking, or do not involve an element of intent or moral turpitude.<sup>99</sup>

The following examines a few examples of a court overturning the Board's recommendations for sanctions. In the first example, the Board gave a doctor a six month suspension which was set aside by the court on the grounds that it was too harsh.<sup>100</sup> The Board found that the doctor violated federal law by prescribing morphine "for office use only" and administering

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94. The Medical Practice Act, FLA. STAT. § 458.331(1)(c) (Supp. 1998).

95. *Id.* § 458.331(1)(q).

96. Interview with Osterhouse, *supra* note 90. Seventy-five physicians were cited under section 458.331(1)(q) of the *Florida Statutes* for inappropriate prescribing. *Id.* Thirty-four physicians were cited under section 458.331(1)(c) of the *Florida Statutes* for conviction of a crime relating to the practice of medicine or ability to practice medicine. *Id.*

97. *Id.*

98. See *Hoover v. Agency for Health Care Admin.*, 676 So. 2d 1380, 1382-83 (Fla. 3d Dist. Ct. App. 1996); *Arthurs v. Stern*, 560 F.2d 477 (Mass. 1977).

99. See generally *Richardson v. Florida State Board of Dentistry*, 326 So. 2d 231 (Fla. 1st Dist. Ct. App. 1976) (finding that the Board's penalty was too harsh, and dismissing the Board's comparison of facts to a case which involved grossly immoral conduct).

100. *Id.* at 236.

it to his patients.<sup>101</sup> The court said that although he did violate federal law by inappropriate use of morphine, he did it without the intent to conceal.<sup>102</sup>

In even more recent examples, sanctions by the Board upon finding physicians prescribing excessive or inappropriate controlled substances have also been met with opposition by the courts.<sup>103</sup> In *Hoover v. Agency for Health Care Administration*,<sup>104</sup> the court found that the agency failed to prove by clear and convincing evidence, that Hoover, the physician, prescribed controlled substances in violation of section 458.331(1)(q) of the *Florida Statutes*.<sup>105</sup> Hoover was treating patients with intractable pain with large quantities of controlled substances.<sup>106</sup> An investigation was conducted, however, and insufficient evidence was presented by expert testimony to disprove the actual disease of the patients.<sup>107</sup> The sanctions by the Board were subsequently reversed.<sup>108</sup> Despite these few cases, because the courts typically defer so much authority to the administrative agency, it is important for counsel to be familiar with the administrative procedures.<sup>109</sup>

When a physician prescribes excessive quantities of controlled substances, a suspension or revocation of the license to practice medicine is usually warranted; the prescription will be deemed inappropriate unless the physician can show through expert testimony that the controlled substances he prescribed were: 1) for patients with serious medical problems requiring the control of pain; 2) in amounts not beyond recommended doses; and 3) for a patient who was already tolerant of such doses.<sup>110</sup>

In a case involving unprofessional conduct where a physician prescribed unlawfully, or in excessive quantities, a controlled substance to a known addict, the court looked to the surrounding circumstances. The Board found that the physician's treatment was incomplete and did not meet community standards. Unfamiliar with the treatment of narcotics addicts,

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101. *Id.* at 234-35.

102. *Id.* at 236.

103. *See Hoover*, 676 So. 2d at 1382. *See also* Reese v. Department of Prof'l Reg., 471 So. 2d 601, 603 (Fla. 1st Dist. Ct. App. 1985); Snejj v. Department of Prof'l Reg., 454 So. 2d 795, 796 (Fla. 3d Dist. Ct. App. 1984).

104. 676 So. 2d 1380 (Fla. 3d Dist. Ct. App. 1996).

105. *Hoover*, 676 So. 2d at 1385. *See also* Jost, *supra* note 23.

106. *Hoover*, 676 So. 2d at 1381.

107. *Id.* at 1385.

108. *Id.* at 1380.

109. Administrative Procedure Act, FLA. STAT. §§ 120.57(1), (2) (1997).

110. *See generally* Johnston v. Department of Prof'l Reg., 456 So. 2d 939 (Fla. 1st Dist. Ct. App. 1984) (evidence was insufficient to demonstrate that the prescribing of Dilaudid was improper because it may have been reasonable under the circumstances). *Id.* at 944.

the Board reprimanded and limited the physician's right to prescribe controlled substances when he treats this class of patients.<sup>111</sup>

Suspension of a physician's license for prescribing controlled substances without adhering to minimum community standards, which may involve first giving a physical examination, for example, is usually upheld by the courts.<sup>112</sup> In a case where a physician prescribed phentermine and phendimetrazine, schedule IV controlled substances, to patients under his continued care without a physical exam, his license was suspended and the Board's proceedings were upheld by the court, which found that this practice did not meet the minimum community standard.<sup>113</sup>

In 1993, a physician appealed a six-month suspension of his medical license and a fine of \$3000 for violation of section 458.331(1)(q) of the *Florida Statutes*, in addition to other sections.<sup>114</sup> The physician stated that due to the inadequacies of the state administrative agency in compiling an index of prior decisions to use as precedent, the judgment was potentially prejudicial.<sup>115</sup> The court upheld the complaint stating that although the administrative agencies are not bound by prior decisions, the core of the judicial system is the doctrine of *stare decisis*, which was not readily available to the defendant.<sup>116</sup> Ironically, while escaping liability on a technicality in 1993, this physician was again cited by the Board in December of 1995 for the same charges.<sup>117</sup> This time the physician voluntarily relinquished his license.<sup>118</sup> Despite the frequency of citations in Florida, the Board, although it does impose sanctions, often fails to implement penalties that are sufficient to deter misconduct.<sup>119</sup> Probably the most paradoxical case in Florida involves a psychiatrist who fought the emergency suspension of his license in 1991, calling the suspension an unconstitutional procedure.<sup>120</sup> The psychiatrist was addicted to Demerol

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111. *Id.* at 943.

112. *Scheininger v. Department of Prof'l Reg.*, 443 So. 2d 387, 388 (Fla. 1st Dist. Ct. App. 1983).

113. *Id.*

114. *Gessler v. Department. of Bus. & Prof'l Reg.*, 627 So. 2d 501, 502 (Fla. 4th Dist. Ct. App. 1993).

115. *Id.* at 503.

116. *Id.* at 504.

117. Interview with Osterhouse, *supra* note 90.

118. *Id.*

119. *See, e.g., Agency for Health Care Admin., Board of Med. v. Blender*, 18 FALR 916 (1995) (physician self injected Darvocet and Valium for four years and received only a license suspension); *Agency for Health Care Admin., Board of Med. v. Royce*, 18 FALR 941 (1995) (psychiatrist's patient died after she self injected herself with controlled substances at her home. The doctor was charged with a record-keeping violation and was issued a letter of reprimand).

120. *Garcia v. Department of Prof'l Reg.*, 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

(meperidine), a schedule II controlled substance, and denied the problem.<sup>121</sup> He also aided in the escape of a minor from a mental institute, took her to a motel, and injected her with Demerol.<sup>122</sup> The court held that emergency suspension of his license under section 120.60(6) of the *Florida Statutes* was not unconstitutional and the suspension was upheld.<sup>123</sup> During research, it was subsequently learned that the psychiatrist in this case was cited by the state agency once again, five years later.<sup>124</sup> In December of 1996, he was charged with eight counts of violations of sections 458.331 and 458.327 of the *Florida Statutes*, including failure to maintain records for injectable Demerol and practicing with a revoked license.<sup>125</sup> This time, the sanctions imposed by the Board were \$5000 and a reprimand.<sup>126</sup> Public records to date show no criminal procedures pending on this psychiatrist, and although reprimanded, his initial suspension in 1991 is not permanent.

Using this case as an example to determine potential penalties from plain statutory application, the conduct of this psychiatrist, at a minimum, violated: 1) multiple sections of the Florida Medical Practice Act;<sup>127</sup> 2) The Florida Comprehensive Drug Abuse Prevention and Control Act;<sup>128</sup> 3) the Controlled Substance Act;<sup>129</sup> and 4) the United States Sentencing Guidelines.<sup>130</sup> ("Guidelines"). The Guidelines equate one gram of Demerol as equivalent to fifty grams of marijuana.<sup>131</sup> Simple calculations for a five-year addiction would conservatively place the psychiatrist at a base level of fourteen of the Guidelines, for 6.5 kilograms of marijuana.<sup>132</sup> In addition,

121. *Id.* at 961.

122. *Id.*

123. *Id.* If the Board finds an immediate, serious danger to the public health, safety, and welfare, it can require emergency suspension or limitation of a physician's license. FLA. STAT. § 120.60(6) (1996).

124. Interview with Osterhouse, *supra* note 90.

125. Section 458.327 of the *Florida Statutes* includes: 1(a) practicing without active license; 1(b) practicing with a suspended or revoked license; and 2(d) leading the public to believe one is licensed without holding an active license. FLA. STAT. §§ 458.327 (1)(a), (b) (1993).

126. Interview with Osterhouse, *supra* note 90.

127. FLA. STAT. § 458 (1993).

128. FLA. STAT. § 893 (1997).

129. 21 U.S.C. § 841 (1994).

130. UNITED STATES SENTENCING GUIDELINES MANUAL § 2D1.1 (1998).

131. See Commentary to section 2D1.1 of the Guidelines (providing drug equivalency tables equating 1 gram of meperidine to 50 grams of marijuana). *Id.*

132. Using a conservative calculation, if the physician used a 50 milligrams-per-milliliter injection one weekly for five years, this is 130 grams of Demerol. Then converting to marijuana, per the guidelines, would require multiplying by a factor of 50, thus equating to 6.5 kilograms of marijuana. In *Chapman v. United States*, 500 U.S. 453 (1991), the Court

appendix to section 3B1.3 of Title 18, of the *United States Code*, mandates an upward departure of two levels from the base offense where the defendant abuses a position of public or private trust in violation of section 841 of Title 21, of the *United States Code*.<sup>133</sup> Therefore, using these conservative calculations, this psychiatrist is at level sixteen of the Guidelines. The Guidelines also require that prior convictions be considered.<sup>134</sup> Though he was not criminally indicted for his 1991 offense, it will be used in this calculation despite the oversight by the state, resulting in a sentence calculation of twenty-one to twenty-seven months of imprisonment. However, the Guidelines are not the only rules that apply. The application of section 841(b)(1)(c) of The Act is for controlled substances in schedules I and II, and mandates a sentence of not more than thirty years imprisonment and a fine not to exceed \$2,000,000.<sup>135</sup> Congressional statutes prevail over the sentencing guidelines if there is a conflict; therefore, the latter calculation under section 841 should control.<sup>136</sup> Amazingly, the calculation is still not complete until the Board has a chance to impose its sanctions. Rule 59R-8.001 of *Florida Administrative Code*,<sup>137</sup> and the Medical Practice Act,<sup>138</sup> would cite the physician with multiple violations resulting in a fine from \$500 to \$10,000 and from one-year probation to a license revocation.<sup>139</sup> This example portrays the incongruity in the rules, and the potential difficulty in prevailing with a fair and foreseeable sentence. Which of the punishments above is appropriate, and if one sanction was imposed, is that sanction enough to constitute "punishment" therefore barring, via double jeopardy, further prosecution? Perhaps the legislation itself is the reason for the reluctance to sanction licensed professionals.

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held that the court of appeals reviewed the sentencing scheme and found it is rational. *Id.* at 456.

133. 18 U.S.C. app. § 3B1.3 (1995).

134. UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.1 (1995).

135. 21 U.S.C. § 841(b)(1)(c) (1994). *See also, supra* note 4.

136. 21 U.S.C. § 841(b).

137. FLA. ADMIN. CODE ANN. r. 59R-8.001 (1997).

138. The Medical Practice Act, FLA. STAT. § 458.331 (1997).

139. Under rule 59R-8.001 of the *Florida Administrative Code Annotated* and section 458.331 of the *Florida Statutes*, inappropriate or excessive prescribing requires a fine from \$250 to \$5000 and from one-year probation to revocation; self prescribing a scheduled drug requires a fine from \$250 to \$5000 and from one-year probation to revocation; improper prescribing of a schedule II controlled substance requires a fine from \$250 to \$5000 and probation, or two year suspension and probation. FLA. ADMIN. CODE ANN. r. 59R-8.001 (1997); FLA. STAT. § 458.331 (1997). However, the Board reserves its right to deviate from these guidelines for multiple violations and trade or sale of a controlled substance.

## V. CONCLUSION: ARE ALL "PUSHERS" TRULY EQUAL?

Ultimately, the physician maintains an unwritten affirmative defense by the mere fact that he or she is a physician. Consider, for example, the infamous case of Dr. Jack Kevorkian. His killing machine used a controlled substance, Thiopental, which he acquired and maintained illegally, in violation of civil and criminal laws. Although Dr. Kevorkian's license to practice medicine was suspended by the Board on November 20<sup>th</sup>, 1991,<sup>140</sup> it was not until March 26, 1999, that Dr. Kevorkian was found guilty of second degree murder.<sup>141</sup> Over 130 lives were lost during that eight year delay, and, even then, Dr. Kevorkian was free on bond for three weeks while awaiting sentencing.<sup>142</sup> Judge Jessica Cooper, who issued the order, seemed to endorse the idea that while Dr. Kevorkian had killed illegally, he is still not really a murderer.<sup>143</sup>

In Florida, a license to practice medicine is considered a privilege which may be withdrawn by the sovereign to preserve the health and welfare of the public and maintain good order in society.<sup>144</sup> The purpose of enacting section 458 of the *Florida Statutes* is to protect the public from practitioners that cannot comply with standards of safe practice.<sup>145</sup> However, once remedial penalties are imposed and the practitioner's license is revoked by the Board, the practitioner becomes a person. Therefore, protecting the public from the practitioner is not enough; the public also needs to be protected from the person. The various arms of the criminal rules are looked to at this point for help in actual punishment. As stated boldly in a Senate Report in 1983, "a sentencing guideline system is intended to treat all classes of offenses committed by all categories of offenders consistently."<sup>146</sup> The legislature admits, in reports such as this, that society consists of differing classes of criminals. To overcome this pitfall, Congress has enacted and supported broad rules with the good faith intent to treat all "pushers" equal, however, little effort is exerted by the state to use this machinery handed to them by Congress.

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140. Detroit Free Press, *Key Dates in Kevorkian's Crusade* (March 26, 1999) (last visited April 9, 1999) <<http://www.freep.com/news/extra2/qkchron26.htm>>.

141. Detroit Free Press, *Convicted of Murder* (March 27, 1999) (last visited April 9, 1999) <<http://www.freep.com/news/extra2/qkevo272.htm>>.

142. *Id.*; *Key Dates in Kevorkian's Crusade*, *supra* note 140.

143. National Post Online, *Medical Hit Man's Mission Stopped* (March 27, 1999) (last visited April 9, 1999) <<http://www.nationalpost.com/news.asp?s2=national&s3=reporter&f=990327/2418065.html>>.

144. *Munch v. Davis*, 196 So. 491, 493-94 (Fla. 1940).

145. FLA. STAT. § 458.301(1993).

146. S. REP. NO. 98-225, at 45-46 (1983).

## The Impact of the Citicorp-Travelers Group Merger on Financial Modernization and the Repeal of Glass-Steagall

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### I. INTRODUCTION

The agreement combining Citicorp and Travelers Group Inc. is a seventy billion dollar dare.<sup>1</sup> The 1933 Glass-Steagall Act<sup>2</sup> and the 1956

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1. *Blue-Chip Issues Continue Retreat as Dow Falls by 65.02*, N.Y. TIMES, April 9, 1998, at D6. The merger was estimated as a seventy billion dollar deal on both sides before stock prices rose. *Id.* at D6.

Bank Holding Company Act<sup>3</sup> forbid combinations of banks and insurance companies, but Citicorp and Travelers are betting that Congress will finally move to modernize banking regulation rather than stand in the wake of such a mega merger and the force of the modern financial marketplace.<sup>4</sup>

This note will discuss both the historical and current state of banking law in the United States. It will also address the impact the announced merger will have on financial reform. Part II will provide a background of banking history and introduce the need for the Glass-Steagall Act. Part III will address the amendments to the Act in order to explain the current provisions of the Act. Part IV will present the current proposed financial modernization legislation, as approved by the House of Representatives. The insurance and banking industries' positions on the proposed financial modernization legislation will be discussed in Part V. Part VI will explain the turf war between the Federal Reserve and the Treasury Department over the proposed legislation. Part VII will discuss the impact of the Citicorp-Travelers merger on Congress to pass financial modernization legislation and/or repeal the Glass-Steagall Act. Part VIII will conclude that the Citicorp-Travelers Group merger will be the catalyst that finally forces Congress to modernize banking regulations to meet global challenges.

## II. BACKGROUND AND PROVISIONS OF THE GLASS-STEAGALL ACT

The Glass-Steagall Act<sup>5</sup> remains as the centerpiece of banking law since its passage in 1933 when it built a wall separating commercial banking and investment banking. Actually, there are two Glass-Steagall measures. The first was the Glass-Steagall Act of 1932,<sup>6</sup> a mere bookkeeping measure that

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2. The Glass-Steagall Act is the name commonly used to refer to §§ 16, 20, 21, 32 of the Banking Act of 1933, 12 U.S.C. § 24 (1994 & Supp. II 1997), 12 U.S.C. §§ 78, 377, 378 (1994).

3. 12 U.S.C. §§ 1841-1850 (1994 & Supp. II 1997).

4. *Financial Services Mergers: Hearing Before the House Banking and Financial Services Comm.*, 105th Cong. (1998) (statement of John J. Roche, general counsel for Citicorp).

We believe we can retain the insurance distribution side . . . if we are not able to manufacture it internally. And should the day come when we need to conform, and the only choice is to divest those insurance manufacturers, if you will, underwriters, then we will do that, a spinoff or some sort of divestiture for the benefit of the stockholders, obviously . . . [a]nd we hope that we can continue with them.

*Id.*

5. 12 U.S.C. § 24 (1994 & Supp. II 1997); 12 U.S.C. §§ 78, 377, 378 (1994).

6. See generally The Glass-Steagall Act of 1932, 58 STAT. 56 (codified as amended at 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997); 12 U.S.C. §§ 78, 377, 378 (1994)).



allowed the Treasury to balance its account.<sup>7</sup> What is commonly known today as the Glass-Steagall law is actually the Bank Act of 1933,<sup>8</sup> which contains the provisions separating the banking and securities businesses.<sup>9</sup> It also laid the foundation for legislation that would allow the Federal Reserve to let banks into the securities business in a limited way.<sup>10</sup>

Fundamental to an understanding of the passage of the Glass-Steagall Act is the fact that by 1933 the U.S. was in one of the worst depressions of its history.<sup>11</sup> A quarter of the formerly working population was unemployed.<sup>12</sup>

7. *Id.* § 5136.

8. Ch. 89, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.).

9. *Id.*

10. Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56–58 (1981) (granting “greatest deference” to Federal Reserve Board and upholding Board’s amending Regulation Y to permit affiliates of commercial banks to act as investment advisors to closed end investment companies although not allowed under Bank Holding Company Act); Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys., 468 U.S. 207 (1984) (upholding Board approval of Bank of America’s purchase of Charles Schwab, arguing that affiliates engaged principally in retail securities sales do not violate Glass-Steagall because their business is limited to the purchase and sale of securities “for the account of customers” as permitted in section 16 of the Act); Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys., 468 U.S. 137, 152 (1984) (holding that commercial paper is a security under §§ 16 and 21 of Glass-Steagall and therefore commercial banks may not privately place commercial paper). On appeal from remand, the United States Circuit Court of Appeals for the District of Columbia held in *Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys.*, 807 F.2d 1052, 1058 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), that commercial paper could be placed by a commercial bank since a private placement is not the same as an underwriting, which is a public offering prohibited by § 16 of Glass-Steagall. See also *Securities Indus. Ass’n v. Comptroller of the Currency*, 577 F. Supp. 252, 253 (D.D.C. 1983) (upholding Comptroller’s decision authorizing discount brokerage services and indicating that discounting securities, in contrast to underwriting, does not involve the risks of investment banking that the Glass-Steagall Act sought to prevent), *aff’d*, 758 F.2d 739 (D.C. Cir. 1985), *aff’d in part and rev’d in part*, 479 U.S. 388 (1987) (upholding Comptroller of the Currency’s approval of discount brokerage services through a bank’s securities subsidiary); *Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys.*, 821 F.2d 810, 811 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (upholding Board decision that banks may combine securities brokerage services and investment advice in an affiliate); *Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys.*, 839 F.2d 47, 66 (2d Cir.), *cert. denied*, 486 U.S. 1059 (1988) (upholding Board decision allowing bank holding company subsidiaries to engage in limited underwriting of commercial paper based on the Board’s construction of the phrase “engaged principally” in § 20 of Glass-Steagall, which was construed to mean that underwriting is permissible if it accounts for no more than ten percent of the affiliate’s gross revenue); *Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 363 (D.C. Cir. 1990) (upholding Board ruling which extended securities underwriting powers to select banks for most types of securities, including corporate debt and equity securities).

11. LESTER V. CHANDLER, AMERICA’S GREATEST DEPRESSION 1929–1941 (1970).

The nation's banking system was chaotic. From 1930 to 1933, more than 9,000 commercial banks had failed.<sup>13</sup> The governors of several states had closed their states' banks, and in March, President Roosevelt closed all the banks in the country.<sup>14</sup> Congressional hearings conducted in early 1933 deduced that the bankers and brokers committed gross misuses of the public's trust and engaged in disreputable and seemingly dishonest dealings.<sup>15</sup> Some historians, in retrospect, have come to a different conclusion about the role such abuses had in bringing down the banks.<sup>16</sup> Some historians now say the primary cause of bank failures was the Depression itself, which caused real estate and other values to fall, thereby undermining bank loans.<sup>17</sup> Securities abuses played a minor role in the collapse of banks, these historians say, and caused few failures among the New York banks which had the largest Wall Street operations.<sup>18</sup>

The Banking Act of 1933<sup>19</sup> was probably the newly elected Roosevelt administration's most important answer to the extensive breakdown of the nation's financial and economic system.<sup>20</sup> But the Act did not affect the most

12. GEORGE J. BENTSON, *THE SEPARATION OF COMMERCIAL AND INVESTMENT BANKING: THE GLASS-STEAGALL ACT REVISITED AND RECONSIDERED* 1 (1990). At the height of the Depression, unemployment hit twenty-five percent, forty percent of the nation's banks failed or were merged and President Roosevelt temporarily closed down the national banking system to halt a panic. *Id.*

13. CARTER H. GOLEMBE & DAVID S. HOLLAND, *FEDERAL REGULATION OF BANKING* 37 (1981).

14. Proclamation No. 2038, 48 Stat. 1689 (1933). Congress ratified the President's emergency actions within three days. Bank Conservation Act, 12 U.S.C. §§ 201-213 (1994).

15. ROBERT E. LITAN, *WHAT SHOULD BANKS DO?* 27 (1987) (citing *Stock Exchange Practices: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency on S. Res. 84 and S. Res. 239*, 72d Cong. (1933)). Hearings led by Ferdinand Pecora, chief counsel of Senator Glass's banking subcommittee, documented major abuses involving large commercial banks and their securities affiliates. *Id.* These included banks making loans to securities purchasers to support artificially elevated securities prices and the dumping of poorly performing stocks in trust accounts managed by the bank. *Id.*

16. See, e.g., Robert J. Rogowski, *Commercial Banks and Municipal Revenue Bonds*, 95 BANKING L.J. 155, 159 (1978); MARK J. FLANNERY, *An Economic Evaluation of Bank Securities Activities Before 1933*, in *DEREGULATING WALL STREET: COMMERCIAL BANK PENETRATION OF THE CORPORATE SECURITIES MARKET* 67-69 (Ingo Walter ed. 1985); *Modernization of the Glass-Steagall Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 100th Cong. 56-58 (1987) (statement of Edward J. Kelly III).

17. *Modernization of the Glass-Steagall Act: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs* 100th Cong. 57 (1987).

18. *Id.*

19. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

20. *Id.*

dominant weaknesses of the American banking system: unit banking within states and the prohibition of nationwide banking. This structure is considered the main cause in the failure of so many United States banks, some ninety percent of which were unit banks with under two million dollars in assets.<sup>21</sup> In contrast, Canada, which had nationwide banking, suffered no bank failures<sup>22</sup> and only a few of the over 9,000 United States banks that failed or merged were branch banks.<sup>23</sup> Instead, the Act created new approaches to financial regulation, notably the establishment of deposit insurance and the legal separation of most aspects of commercial and investment banking (with the exception of allowing commercial banks to underwrite most government-issued bonds).<sup>24</sup>

The primary force behind the law was Senator Carter Glass.<sup>25</sup> Glass was a former Treasury Secretary who is considered the father of the Federal Reserve System and a critic of banks that dealt in what he considered the risky business of investing in stocks.<sup>26</sup> Senator Glass wanted banks to stick to conservative commercial lending, and he capitalized on the anti-bank viewpoints to push through the changes he wanted.<sup>27</sup> Only two years after

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21. STAFF OF SENATE SUBCOMM. ON FINANCIAL INSTITUTIONS OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 94TH CONG., 2D SESS., COMPENDIUM OF ISSUES RELATING TO BRANCHING BY FINANCIAL INSTITUTIONS 1, 27 (Comm. Print 1976) [hereinafter COMPENDIUM OF ISSUES] (explaining Comptroller Pole's criticism of unit banking because of the previously inconceivable number of small bank failures during the Great Depression).

22. See Eugene Nelson White, *A Reinterpretation of the Banking Crisis of 1930*, 44 J. ECON. HIST. 119, 131-32 (1984) (asserting United States bank failures in 1930 were disparately concentrated in the category of small, local banks that did not have branches and therefore, were not geographically diverse). Some commentators have asserted that Canada averted bank failures during the early 1930s because Canada's system was dominated by large nationwide banks that were geographically diverse. *E.g., id.* at 131-32.

23. Leonard Lapidus, *State and Federal Deposit Insurance Schemes*, 53 BROOK. L. REV. 45, 48 (1987) (noting branch banks coped better with the pressures of the Depression when compared with unit banks); see also COMPENDIUM OF ISSUES, *supra* note 21, at 88-89 (referencing paper by Gary G. Gilbert, FIN. ECONOMIST, FEDERAL DEPOSIT INSURANCE CORPORATION).

24. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

25. Carter H. Golembe, *History Disputes Tales of Pre-1933 Securities Irregularities by Banks*, BANKING POL'Y REP., Apr. 3, 1995, at 3.

26. *Id.*

27. Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 696-97 (1987).

Glass-Steagall was enacted, Senator Glass led an effort to have it repealed, because he thought it was a mistake and an overreaction.<sup>28</sup>

Congressman Henry Steagall, a Democrat who was Chairman of the House Banking and Currency Committee, developed a desire for helping farmers and rural banks growing up in Ozark, Alabama.<sup>29</sup> He had little interest in separating banking from Wall Street, but signed on to the bill after Senator Glass agreed to attach Congressman Steagall's amendment, which authorized bank deposit insurance for the first time.<sup>30</sup>

For several years before 1933, Senator Glass wanted to restrict or forbid commercial banks from dealing in and holding corporate securities.<sup>31</sup> He strongly believed that bank involvement with securities was harmful to the Federal Reserve System, against the rules of sound banking, accountable for stock market speculation, the Crash of 1929, bank failures, and the Great Depression.<sup>32</sup> It is commonly acknowledged that he was not able to accomplish his goal of separating commercial and investment banking until disclosures concerning National City Bank, the predecessor to Citibank, were brought out in the Senate Committee on Banking and Currency's Stock Exchange Practices Hearings.<sup>33</sup> Disappointment with speculators and securities merchants carried over from investment bankers to commercial bankers. The two were equally abhorred, and an embittered public did not care to make distinctions between them.<sup>34</sup> The Banking Act of 1933<sup>35</sup> was passed and quickly signed into law.<sup>36</sup>

Restricting banks' ability to grow too large has been a common focus in legislation over the years. During the 1930s and 1940s, banks adhered to the

28. See 79 CONG. REC. 11,827, 11,933-35 (1935). Glass urged repeal because he thought he was wrong, when he expected the investment banking industry could furnish the capital needs of American businesses without involving commercial banks. *Id.*

29. Langevoort, *supra* note 27, at 696-97.

30. *Id.*

31. Golembe, *supra* note 25, at 3.

32. *Id.*

33. *Stock Exchange Practices: Hearings before the Senate Comm. on Banking and Currency on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.)* 1st Sess. (1934), reprinted in 7 LEGISLATIVE HIST. OF THE SEC. ACT OF 1933 AND SEC. EXCHANGE ACT OF 1934, at Item 22 (J. S. Ellenberger & Ellen P. Mahar eds., 1973); see also Golembe, *supra* note 25, at 3; Langevoort, *supra* note 27, at 696-97.

34. George G. Kaufman, *The Securities Activities of Commercial Banks*, in HANDBOOK FOR BANKING STRATEGY 661, 667-68 (Richard C. Aspinwall & Robert A. Eisenbeis eds., 1985).

35. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

36. *Id.*

basics of taking deposits and making loans.<sup>37</sup> Congress did not intervene again until 1956, when it enacted the Bank Holding Company Act to hinder financial services conglomerates from accumulating too much power.<sup>38</sup> That law built a wall between banking and insurance in response to aggressive acquisitions and expansion by TransAmerica Corporation, an insurance company that owned Bank of America and an assortment of other businesses.<sup>39</sup> Congress thought it inappropriate for banks to risk potential

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37. See Brenton C. Leavitt, *The Philosophy of Financial Regulation*, 90 BANKING L.J. 632, 646–47 (1973) (asserting that the philosophy of banking from the late 1930s through the 1950s was one of “caution, risk avoidance, and only limited concern for maintenance of a competitive climate”).

38. 12 U.S.C. §§ 1841–1850 (1994 & Supp. II 1997) (§ 1845 repealed 1966); see S. REP. NO. 1095 84–1095 (1955), *reprinted in* 1956 U.S.C.C.A.N. 2482, 2482–83. The general statement of the Senate report regarding the Bank Holding Company Act states:

[P]ublic welfare requires the enactment of legislation providing Federal regulation of the growth of bank holding companies and the type of assets it is appropriate for such companies to control. In general, the philosophy of this bill is that bank holding companies ought to confine their activities to the management and control of banks and that such activities should be conducted in a manner consistent with the public interest. Your committee believes that bank holding companies ought not to manage or control nonbanking assets having no close relationship to banking.

It is not the committee's contention that bank holding companies are evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities. The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking in our present national economy.

*Id.*

39. 101 CONG. REC. 8040–41 (1955). In June 1955, the House Committee on Banking and Currency reported:

One of the regulated bank holding companies which owns more than 50 percent of the capital stocks of banks with total deposits of slightly over \$2 billion . . . owns all of the capital stock of a life insurance company . . . with over \$5 billion of life insurance in force . . . in 47 states, 7 Canadian Provinces, Hawaii, Alaska, and the District of Columbia. In addition, the holding company owned from 92.5 to 100 percent of the capital stock of 4 fire and casualty insurance companies which write practically all forms of insurance other than life.

*Id.* See also Cynthia C. Lichtenstein, *Thinking the Unthinkable: What Should Commercial Banks or Their Holding Companies Be Allowed to Own?*, 67 IND. L.J. 251, 251 n.1 (1992) (asserting that Congress enacted amendments, in 1970, to the Bank Holding Company Act in order to separate banking from commerce because First National City Bank (now Citibank) led the money center banks in using the one bank holding company to engage in nontraditional banking businesses).

losses from underwriting insurance.<sup>40</sup> While many banks today sell insurance products provided by insurers, banks still are not permitted to take on the risk of underwriting.

Several efforts since 1933 by commercial bankers, their lobbyists, and at times, regulators, to repeal or carve exceptions to the Glass-Steagall Act have not been successful.<sup>41</sup> These attempts have centered on those sections of the Act that require separation of commercial and investment banking.<sup>42</sup> Consequently, the United States is in a minority with the world's major financial nations, for legally requiring this separation.<sup>43</sup>

### III. PROVISIONS OF THE GLASS-STEAGALL ACT

The Glass-Steagall Act has come to stand for only those sections of the Banking Act of 1933 that refer to banks' securities operations—sections 16, 20, 21, and 32.<sup>44</sup> These four sections of the Act, as amended and interpreted by the Comptroller of the Currency, the Federal Reserve Board and the courts, control commercial banks' domestic securities operations in many ways. Sections 16 and 21 relate to the direct operations of commercial banks while sections 20 and 32 refer to commercial bank affiliations.<sup>45</sup>

Section 16,<sup>46</sup> as amended by the Banking Act of 1935,<sup>47</sup> generally prohibits Federal Reserve member banks from purchasing securities for their own account. However, a national bank (chartered by the Comptroller of the Currency) may purchase and hold investment securities up to ten percent of

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40. Lichtenstein, *supra* note 39.

41. James R. Smoot, *Financial Institutions Reform in the Wake of VALIC*, 29 CREIGHTON L. REV. 691, 701–02 (1996).

42. *Id.*

43. Christopher T. Toll, Note, *The European Community's Second Banking Directive: Can Antiquated United States Legislation Keep Pace?*, 23 VAND. J. TRANSNAT'L L. 615, 617–18 (1990); see also Peter J. Ferrara, *The Regulatory Separation of Banking from Securities and Commerce in the Modern Financial Marketplace*, 33 ARIZ. L. REV. 583, 617 (1991) (explaining that banks permitted to underwrite securities abroad place United States banks at a competitive disadvantage).

44. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.). The Glass-Steagall Act is the common name for four sections of this Act: § 16 (codified as amended at 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997)), § 20 (codified as amended at 12 U.S.C. § 377 (1994)), § 21 (codified as amended at 12 U.S.C. § 378 (1994)), and § 32 (codified as amended at 12 U.S.C. § 78 (1994)).

45. *Id.*

46. 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997) (defining investment securities as bonds, notes, or debentures considered by the Comptroller to be investment securities).

47. Banking Act of 1935, ch. 614, 49 Stat. 709, § 308(a) (codified as amended at 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997)).

its capital and surplus.<sup>48</sup> Sections 16 and 21 also prohibit deposit taking institutions from both accepting deposits and engaging in the business of “issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stock, bonds, debentures, notes or other securities,” with some notable exceptions.<sup>49</sup> These exceptions include United States Government obligations, obligations issued by government agencies, college and university dormitory bonds, and the general obligations of states and political subdivisions.<sup>50</sup> Municipal revenue bonds, other than those used to finance higher education and teaching hospitals, are not included in the exceptions, in spite of the attempts of commercial banks to have Congress reform the Act.<sup>51</sup> In 1985, however, the Federal Reserve Board pronounced that commercial banks could act as advisers and agents in the private placement of commercial paper.<sup>52</sup>

Section 16<sup>53</sup> permits commercial banks to purchase and sell securities directly, without recourse, solely on the order of and for the account of customers.<sup>54</sup> In the early 1970s, the Comptroller of the Currency approved Citibank’s plan to offer the public units in collective investment trusts that the bank organized.<sup>55</sup> But in 1971, the United States Supreme Court ruled that sections 16<sup>56</sup> and 21<sup>57</sup> prohibit banks from offering a product that is similar to mutual funds.<sup>58</sup> In an often quoted decision, the Court found that the Act was intended to prevent banks from endangering themselves, the banking system, and the public from unsafe and unsound practices and conflicts of interest.<sup>59</sup> Nevertheless, in 1986 the Comptroller of the Currency decided that the Act allowed national banks to purchase and sell mutual shares for its customers as their agent and sell units in unit investment

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48. 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997); 12 U.S.C. §§ 78, 377, 378 (1994).

49. Section 16 of the Banking Act is now codified as 12 U.S.C. § 378.

50. *Id.*

51. *Id.*

52. Bankers Trust Commercial Paper Placement Activities, [1984–1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 86,270, at 90,836 (June 4, 1985).

53. 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997).

54. *Id.*

55. 12 C.F.R. § 9 (1998).

56. 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997).

57. 12 U.S.C. § 378 (1994).

58. *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971). This is the seminal Glass-Steagall case, where the Court first introduced guidelines for determining the permissibility of commercial bank involvement in banking activities not expressly covered in the Act. *Id.*

59. *Id.*

trusts.<sup>60</sup> In 1987, the Comptroller also concluded that a national bank may offer to the public, through a subsidiary, brokerage services and investment advice, while acting as an adviser to a mutual fund or unit investment trust.<sup>61</sup> Since 1984, the regulators have allowed banks to offer discount brokerage services through subsidiaries, and these more permissive rules have been upheld by the courts.<sup>62</sup> Thus, more recent court decisions and regulatory agency rulings have tended to soften the 1971 Supreme Court's apparently strict interpretation of the Act's prohibitions.<sup>63</sup>

Section 20<sup>64</sup> prohibits banks from affiliating with a company "engaged principally" in the "issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities."<sup>65</sup> In June 1988, the United States Supreme Court, by denying certiorari, upheld a lower court's ruling accepting the Federal Reserve Board's April 1987 approval for member banks to affiliate with companies underwriting commercial paper, municipal revenue bonds, and securities backed by mortgages and consumer debts, as long as the affiliate does not principally engage in those activities.<sup>66</sup>

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60. OCC Interpretive Letter No. 363, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,533, at 77,828 (May 23, 1986) (authorizing national banks to act as agents in the buying and selling of unit investment trusts).

61. 12 C.F.R. § 225.25(b)(15) (1998) (codifying the Federal Reserve Board's limited exception to Regulation Y's prohibition that a bank holding company providing discount brokerage services may not provide investment advice or research services and allowing National Westminster Bank, PLC to provide discount brokerage services to institutional and high net worth customers); *see also* *Manufacturers Hanover Corp.*, 73 FED. RESERVE BULL. 930 (1987) (permitting limited sharing of customer lists between a bank and an affiliated broker serving institutional customers); *J.P. Morgan & Co.*, 73 FED. RESERVE BULL. 810 (1987) (expanding banks authority to engage in investment advisory and execution services); *Citicorp*, 73 FED. RESERVE BULL. 473 (1987) (authorizing banks, within limits, to engage in dealing in securities and underwriting).

62. *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 207 (1984). Discount brokerage activities also have been held permissible for national banks. *Securities Indus. Ass'n v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *aff'd in part and rev'd in part sub nom. Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) (holding that a discount brokerage office operated by a national bank is not a branch for purposes of the geographic restrictions of the McFadden Act).

63. *See* *Investment Co. Inst. v. Camp*, 401 U.S. 617, 631 (1971) (holding strict interpretation of Glass-Steagall because "public confidence is essential to the solvency of a bank").

64. 12 U.S.C. § 377 (1994).

65. *Id.*

66. *Citicorp*, 73 FED. RESERVE BULL. 473, 475 (1987) (approving bank holding companies' applications to underwrite and deal in municipal revenue bonds, mortgage-backed securities, and commercial paper).



"Principally engaged" was defined by the Federal Reserve as activities contributing more than five to ten percent of the affiliate's total revenue.<sup>67</sup> In 1987, the District of Columbia Court of Appeals affirmed the Federal Reserve Board's 1985 ruling allowing a bank holding company to acquire a subsidiary that provided both brokerage services and investment advice to institutional customers.<sup>68</sup> Between 1984 and 1988 the Court held that affiliates of member banks can offer retail discount brokerage service, which excludes investment advice, on the grounds that these activities do not involve an underwriting of securities, and that "public sale" refers to an underwriting.<sup>69</sup>

Section 32<sup>70</sup> prohibits a member bank from having interlocking directorships or close officer or employee relationships with a firm "primarily engaged" in securities underwriting and distribution.<sup>71</sup> Section 32<sup>72</sup> is applicable even if there is no common ownership or corporate affiliation between the commercial bank and the investment company.<sup>73</sup>

Sections 20<sup>74</sup> and 32<sup>75</sup> do not apply to nonmember banks and savings and loan associations.<sup>76</sup> They are legally free to affiliate with securities

67. *Id.*

68. *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 821 F.2d 810 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (combining offerings of securities brokerage and investment advice for bank holding companies' institutional customers upheld).

69. *See Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 221 (1984) (allowing discount brokerage services); *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1048 (2d Cir. 1989) (allowing the sale of interests in a pool of assets consisting of home mortgages); *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 839 F.2d 47, 69 (2d Cir.) (allowing underwriting of securities through bank affiliates), *cert. denied*, 486 U.S. 1059 (1988); *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 821 F.2d 810, 811 (D.C. Cir. 1987) (allowing bank to act as a full-service broker and investment adviser), *cert. denied*, 484 U.S. 1005 (1988); *Investment Co. Inst. v. FDIC*, 815 F.2d 1540 (D.C. Cir.) (per curiam) (allowing underwriting of securities by nonmember bank affiliates), *cert. denied*, 484 U.S. 847 (1987); *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 807 F.2d 1052, 1069-70 (D.C. Cir. 1986) (allowing bank to act as an agent in private placement of securities), *cert. denied*, 483 U.S. 1005 (1987); *Investment Co. Inst. v. Clarke*, 793 F.2d 220, 222 (9th Cir.) (allowing the operation of a pooled trust fund), *cert. denied*, 479 U.S. 939 (1986); *Investment Co. Inst. v. Conover*, 790 F.2d 925, 927 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986); *Investment Co. Inst. v. Clarke*, 789 F.2d 175, 175 (2d Cir.) (per curiam), *cert. denied*, 479 U.S. 940 (1986).

70. 12 U.S.C. § 78 (1994).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* § 377 (1994).

75. 12 U.S.C. § 78 (1994).

76. 12 U.S.C. §§ 78, 377 (1994).

firms. Consequently, the law applies unevenly to essentially similar institutions. In addition, securities brokers' cash management accounts, which are functionally identical to checking accounts, have been judged not to be deposits, as specified in the Act.<sup>77</sup>

It is interesting to note, that commercial banks are not barred from underwriting and dealing in securities outside of the United States.<sup>78</sup> The larger money center banks, against whom the prohibitions of the Glass-Steagall Act were directed, are particularly active in these markets. Citicorp, for example, has a presence in nearly 100 countries, is a member in major foreign stock exchanges, and offers investment banking services in many foreign countries.<sup>79</sup>

In summary, commercial banks are allowed to offer many financial services. These include certain aspects of investment advisory services, brokerage activities, securities underwriting, mutual fund activities, investment and trading activities, asset securitization, joint ventures, and commodities dealing. They can also offer deposit instruments that are similar to securities.

The commonly accepted rationale for the Glass-Steagall Act is well expressed in the Supreme Court's opinion in *Investment Company Institute v. Camp* ("ICI"),<sup>80</sup> when it analyzed the policies behind the Act.<sup>81</sup> William Camp, the Comptroller of the Currency, gave First National City Bank, now Citibank, permission to offer commingled investment accounts.<sup>82</sup> In *Investment Co. Institute v. Camp*,<sup>83</sup> the United States Supreme Court decided in favor of the ICI and described the rationale for the Act as follows:<sup>84</sup>

There is no dispute that one of the objectives of the Glass-Steagall Act was to prohibit commercial banks, banks that receive deposits subject to repayment, lend money, discount and

77. Langevoort, *supra* note 27, at 710.

78. Ferrara, *supra* note 43, at 617.

79. 9 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 123-126 (Paula Kepos et al. eds., St. James Press 1994); *Financial Services Mergers: Hearing Before the House Banking and Financial Services Committee*, 105th Cong. (1998) (statement of John J. Roche, general counsel for Citicorp).

80. 401 U.S. 617 (1971). The seminal Glass-Steagall case, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971), introduced guidelines for determining the permissibility of commercial bank involvement in banking activities not expressly covered in the Act. *Id.* It is interesting to note that First National City Bank was Citibank's predecessor.

81. *Id.*

82. Comptroller Camp's approval was promulgated in 12 C.F.R. § 9.18(a) (1998).

83. 401 U.S. 617 (1971).

84. *Id.*

negotiate promissory notes and the like, from going into the investment banking business.

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The failure of the Bank of United States in 1930 was widely attributed to that bank's activities with respect to its numerous securities affiliates. Moreover, Congress was concerned that commercial banks in general and member banks of the Federal Reserve System in particular had both aggravated and been damaged by stock market decline partly because of their direct and indirect involvement in the trading and ownership of speculative securities. The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the "hazards" and "financial dangers" that arise when commercial banks engage in the activities proscribed by the Act.<sup>85</sup>

#### IV. THE FINANCIAL SERVICES ACT OF 1998

The version of financial institution modernization that passed by a narrow margin,<sup>86</sup> in the House of Representatives in May 1998, would make sweeping changes to the nation's banking laws. It permits broader cross affiliations between banks and other financial services providers, such as insurance companies and securities firms.<sup>87</sup> The Financial Services Act of 1998 ("H.R. 10")<sup>88</sup> is designed to provide a regulatory framework for this new financial order.<sup>89</sup>

##### A. *Holding Company Provisions*

The Glass-Steagall restrictions on banks affiliating with securities firms would be repealed, thereby allowing commercial banking and investment banking to be combined in a financial holding company with no additional walls, commonly known as firewalls, or limitations.<sup>90</sup> The Bank Holding Company Act restrictions on banks affiliating with insurance companies

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85. *Id.* at 629-30 (footnotes omitted).

86. Passed by a vote of 214-213 on May 13, 1998.

87. Financial Services Act of 1998, H.R. 10, 105th Cong., (1998).

88. *Id.*

89. *Id.*

90. *Id.*

would also be repealed.<sup>91</sup> In addition, state laws that “prevent or significantly interfere” with such affiliations would be preempted.<sup>92</sup>

Holding companies wishing to qualify for this new authority must have all of their bank affiliates meet at least a satisfactory Community Reinvestment Act (“CRA”)<sup>93</sup> rating, and offer and maintain low cost basic banking accounts if they offer consumer transaction accounts to the general public.<sup>94</sup> Furthermore, both the parent holding company and all subsidiary depository institutions have to be well capitalized and well managed.<sup>95</sup>

The Federal Reserve Board remains the umbrella regulator for the new holding companies and has limited authority over the functionally regulated affiliates.<sup>96</sup> The Securities and Exchange Commission is given backup authority over wholesale financial holding companies.<sup>97</sup> H.R. 10 requires that the Federal Reserve Board defer to the Securities and Exchange Commission or the state insurance commissioner on all interpretations and enforcement of applicable federal securities laws or state insurance laws.<sup>98</sup>

The Federal Reserve Board is permitted to transfer its authority to the appropriate federal banking agency of the lead insured depository institution subsidiary if it is not significantly engaged in nonbanking activities.<sup>99</sup> In addition, financial holding companies would be allowed to engage in activities that are deemed to be financial in nature or incidental to financial activities by the legislation, including insurance underwriting and merchant banking.<sup>100</sup> The Federal Reserve Board is also given authority to deem other activities to be financial in nature or incidental to financial activities.<sup>101</sup>

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91. *Id.* § 102.

92. Financial Services Act of 1998, H.R. 10, 105th Cong., 2d Sess. § 104 (1998).

93. 12 U.S.C. §§ 2901–2907 (1994) (stating financial institutions have a “continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered”).

94. Financial Services Act of 1998, H.R. 10, 105th Cong., 2d Sess. § 121 (1998).

95. *Id.*

96. *Id.* § 111 (describing functional regulation as regulation based on the type of product rather than the type of institution).

97. *Id.*

98. Financial Services Act of 1998, H.R. 10, 105th Cong., 2d Sess. § 111 (1998) (mandating deference to the Securities and Exchange Commission and to state insurance regulators within their respective jurisdictions).

99. *Id.*

100. *Id.* § 103.

101. *Id.*

## B. *Banking and Commerce*

The commercial baskets contained in the original bill were eliminated.<sup>102</sup> The bill allows for a grandfathered commercial basket for new financial holding companies of no more than fifteen percent of the annual gross revenues of the holding company for a period of ten years.<sup>103</sup> The Federal Reserve Board is authorized to grant one additional five year extension for the divestiture of nonfinancial activities.<sup>104</sup>

The wholesale financial services holding companies authorized by the bill are allowed to retain commodities they own.<sup>105</sup> This allowance is subject to a five percent limitation of total consolidated assets of the holding company at the time it becomes a wholesale financial services holding company.<sup>106</sup> In addition, wholesale financial services holding companies have a fifteen percent grandfathered commercial basket that does not sunset or automatically expire.<sup>107</sup>

## C. *State Law Preemption for Authorized Activities*

State laws that prevent or significantly interfere with activities allowed by H.R. 10,<sup>108</sup> or any other provision of Federal law, are preempted for all insured depository institutions or wholesale financial institutions.<sup>109</sup> H.R. 10 affirms the applicability of state insurance regulation, like the McCarran-Ferguson Act,<sup>110</sup> and provides a safe harbor for state laws governing insurance sales.<sup>111</sup> This is essentially for state laws that are no more stringent than the Illinois law which requires physical separation of insurance and banking activities.<sup>112</sup> The legislation also requires the federal

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102. *Financial Restructuring: Highlights of Treasury's 1997 Legislative Proposal on Financial Modernization*, BANKING POL'Y REP., June 16, 1997, at 7 (explaining commercial baskets would permit bank holding companies to invest in, and maintain their longstanding investments in, commercial businesses that do not engage in financial activities).

103. Financial Services Act of 1998, H.R. 10, 105th Cong. § 103 (1998).

104. *Id.*

105. *Id.* § 136.

106. *Id.*

107. *Id.*

108. Financial Services Act of 1998, H.R. 10, 105th Cong. § 309 (1998).

109. *Id.* § 309.

110. 15 U.S.C. §§ 1011-1015 (1994).

111. Financial Services Act of 1998, H.R. 10, 105th Cong. § 309 (1998).

112. *Financial Services Mergers: Hearing of the House Banking and Financial Services Comm.*, 105th Cong. (1998) (statement of Bill Greenwood, president-elect of the Independent Insurance Agents of America).

banking agencies to enact joint consumer protection regulations for the sale of insurance.<sup>113</sup>

#### D. *Subsidiaries*

H.R. 10 restricts national bank subsidiaries from engaging in any activity that is not authorized by federal statute for a national bank, such as certain insurance underwriting activities, merchant banking or real estate development.<sup>114</sup> The bill amends the Banking Act of 1933 to prohibit all bank subsidiaries, state and federal, from underwriting securities.<sup>115</sup> It does, however, allow a national bank to own a subsidiary that conducts agency activities that are financial in nature.<sup>116</sup> For example, insurance agency activities could be conducted without geographic restriction.

#### E. *Wholesale Financial Institutions*

The legislation creates a Wholesale Financial Institution, ("WFI"), commonly pronounced woofie, which can be state or national and can make loans to businesses but, is not insured, and cannot take retail deposits or deposits of less than \$100,000.<sup>117</sup> This will allow securities firms to provide wholesale banking services without becoming subject to many of the rules designed to protect retail consumers and the deposit insurance fund.<sup>118</sup> WFIs are subject to bank holding company regulations and the Community Reinvestment Act.<sup>119</sup> The Federal Reserve is given authority to exempt WFIs from any regulation if they are consistent with the safety and soundness of the institution and would not put the deposit insurance funds or creditors of the institution at risk.<sup>120</sup>

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113. Financial Services Act of 1998, H.R. 10, 105th Cong. § 308 (1998).

114. *Id.* at § 121. This would substantially reduce the Office of the Comptroller of the Currency's authority to expand national bank activities through its operating subsidiary regulations. Some of the activities that would be prohibited in the bank subsidiary may be permissible if engaged in by an affiliate of the holding company. See discussion *infra* Part VI. for a more complete discussion of the operating subsidiary issue that has been at the center of much controversy between the agencies over this bill.

115. Financial Services Act of 1998, H.R. 10, 105th Cong. § 121 (1998) (amending 12 U.S.C. §§ 24, 5136).

116. *Id.* § 121.

117. *Id.* § 136.

118. *Id.*

119. *Id.*

120. Financial Services Act of 1998, H.R. 10, 105th Cong. § 136 (1998).

## F. *Federal Home Loan Bank System*

H.R. 10 allows community financial institutions to be members in the Federal Home Loan Bank System.<sup>121</sup> A community financial institution is defined as an insured depository institution with less than \$500 million in total assets.<sup>122</sup> Furthermore, it permits community financial institutions that are members of the Federal Home Loan Bank System to get long term advances for funding small business, agriculture or rural development.<sup>123</sup>

## G. *Insurance*

H.R. 10 prohibits national banks from underwriting insurance.<sup>124</sup> Activities that are presently authorized by the Office of the Comptroller of the Currency ("OCC") are grandfathered.<sup>125</sup> National banks are prohibited from selling or underwriting title insurance unless the national bank or its subsidiary was actively and lawfully engaged in that business before the date of enactment.<sup>126</sup> Furthermore, a national bank will be permitted to sell title insurance in a state in which state chartered banks were authorized to sell title insurance as agents as of January 1, 1997.<sup>127</sup>

The bill expedites the review of disputes between insurance regulators and the OCC over the classification of new products.<sup>128</sup> In addition, it eliminates the judicial "deference" afforded to the OCC in court disputes with state insurance commissioners.<sup>129</sup> H.R. 10 also creates a national licensing system for insurance within five years, thereby allowing banks and insurance companies to sell insurance nationwide without having to comply with varying state licensing requirements.<sup>130</sup> A bank desirous of selling insurance would be required to purchase an existing, at least two years old, insurance agency in that state.<sup>131</sup> This provision will sunset in five years.<sup>132</sup>

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121. *Id.* § 162.

122. *Id.*

123. *Id.* § 165.

124. *Id.* § 304.

125. Financial Services Act of 1998, H.R. 10, 105th Cong. §304 (1998).

126. *Id.* § 306.

127. *Id.*

128. *Id.* § 307.

129. *Id.* § 307(a).

130. Financial Services Act of 1998, H.R. 10, 105th Cong. § 322 (1998).

131. *Id.* § 305.

132. *Id.*

## H. *Securities*

Banks will lose their complete exemption from broker dealer registration.<sup>133</sup> However, the bill recognizes that banks have traditionally been involved in certain securities activities and provides specific exemptions for those activities.<sup>134</sup> These are including, but not limited to, trust activities and government securities. To the extent that banks offer investment advice to a mutual fund, they will lose their exemption from the Investment Advisors Act of 1940.<sup>135</sup>

## I. *Thrift Charter/Unitary Thrift Holding Company*

The thrift charter is preserved.<sup>136</sup> The bill grandfathers existing unitary thrift holding companies and permits them to change owners, and retain all powers.<sup>137</sup> The unitary thrift structure permits any type of company, financial or nonfinancial, to own a thrift charter.<sup>138</sup> However, new unitary thrift holding companies that had not applied for a charter by March 31, 1998 are prohibited.<sup>139</sup>

## J. *National Association of Regulated Agents and Brokers*

H.R. 10 establishes the National Association of Regulated Agents and Brokers ("NARAB").<sup>140</sup> The NARAB provision is designed to force the states to create more uniform licensing and regulation for the sale of insurance.<sup>141</sup> This provision takes effect three years after passage of the bill, if the states have not acted.<sup>142</sup>

## V. INSURANCE AND BANKING INDUSTRIES' POSITIONS

Like most commercial banks, banking trade groups, and smaller financial institutions, Citicorp was opposed to the passage of H.R. 10.<sup>143</sup>

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133. *Id.* § 206.

134. *Id.*

135. Financial Services Act of 1998, H.R. 10, 105th Cong. §§ 211–212 (1998).

136. *Id.* §§ 401–402.

137. *Id.*

138. *Id.*

139. *Id.* §§ 401–402 (1998).

140. Financial Services Act of 1998, H.R. 10, 105th Cong. § 322 (1998).

141. *Id.*

142. *Id.* § 321.

143. Sam Loewenberg, *Getting it Done: With billions at stake, Citicorp and Travelers pull out the stops to get past '30s-era regulations preventing their merger plan*, BROWARD DAILY BUS. REV., Apr. 28, 1998, at A1.



Citicorp has become a supporter of H.R. 10 since its deal with Travelers was announced.<sup>144</sup> The bill's opponents generally argue that few additional benefits are provided while they are potentially subject to a more complex and vague regulatory framework. Citicorp opposed the bill, largely because of the limitations it placed on banks getting into the insurance business.<sup>145</sup> The bill's main industry supporters are the insurance and securities industries, and several large banks, which argue that the legislation enables financial service providers to offer customers a broader range of financial services and products, while remaining competitive both in the United States and abroad.<sup>146</sup>

## VI. FEDERAL RESERVE AND THE TREASURY DEPARTMENT TURF WAR

The Federal Reserve and the Office of the Comptroller of the Currency ("OCC") present sharply different views as to the desirability of H.R. 10.<sup>147</sup> A noticeably bitter struggle over the reign of federal bank regulatory authority has continued for several years between the OCC and the Federal Reserve.<sup>148</sup>

### A. *Current Regulatory Structure*

There are currently three federal banking agencies, the Federal Reserve, the OCC, and the Federal Deposit Insurance Corporation (FDIC).<sup>149</sup> National banks are supervised and regulated by the OCC while the Federal Reserve or the FDIC supervise and regulate state chartered banks.<sup>150</sup> Were the powers and missions of these three agencies identical, competition among them would not be very important, nor would it reach the level that commentators often characterize as a "turf war."<sup>151</sup>

The OCC is the only all inclusive banking agency among the three agencies, with the power to charter a bank, supervise or regulate the bank,

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144. Jeffrey Marshall, *Capital Question: Does Might Make Right?*, U.S. BANKER, June 1998, at 38.

145. Loewenberg, *supra* note 143, at A1.

146. *Id.*

147. Leslie Wayne, *More Maneuvering and More Delay for Banking Bill*, N.Y. TIMES, July 18, 1998, at D3.

148. Carter H. Golembe, *Much More is Involved in Agency Turf Wars than Meets the Eye*, BANKING POL'Y REP., Sept. 18, 1995, at 2.

149. CARTER H. GOLEMBE & DAVID S. HOLLAND, *FEDERAL REGULATION OF BANKING* 11 (1981).

150. *Id.* at 12-13.

151. *Id.* at 2.

and close the bank.<sup>152</sup> It is responsible for maintaining the safety and soundness of the federal banking system while accommodating the nation's need for competitive and innovative banking.<sup>153</sup> The Comptroller of the Currency, which is part of the Treasury Department within the Executive branch, has historically been a strong advocate of modernizing banking law.<sup>154</sup>

The Federal Reserve and FDIC have only bank supervisory and regulatory powers for state chartered banks under their respective jurisdictions.<sup>155</sup> These powers are shared with the state chartering agencies.<sup>156</sup> However, bank supervision and regulation is not the most important responsibility of each agency.<sup>157</sup> The FDIC's primary responsibility is to manage the deposit insurance system.<sup>158</sup> The Federal Reserve's primary purpose is to act as the nation's central bank and to achieve sound monetary policy.<sup>159</sup>

Although the Federal Reserve is a relatively minor player in terms of supervision and regulation of individual banks, it is the sole regulator for bank holding companies.<sup>160</sup> The Federal Reserve received this power in 1970, over arduous protests by the Treasury.<sup>161</sup> The Federal Reserve has generally regarded bank supervision and regulation as useful and sometimes critical for achieving its monetary policy responsibilities.<sup>162</sup> Even so, bank supervision and regulation are clearly of secondary importance to the Federal Reserve.<sup>163</sup>

## B. *Interagency Friction*

The Federal Reserve and the Treasury have conflicted before. To somewhat oversimplify their relationship, the Treasury is a borrower of

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152. *Id.* at 17.

153. *Id.* at 11.

154. GOLEMBE, *supra* note 149, at 17–18.

155. *Id.* at 11.

156. *Id.* at 18–20.

157. *Id.* at 11.

158. *Id.*

159. GOLEMBE, *supra* note 149, at 11.

160. *Id.* at 11, 13.

161. H.R. CONF. REP. NO. 91–1747 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5561, 5562. In the late 1960s many banks converted into one bank holding companies to avoid Bank Holding Company Act (“BHCA”) regulation by the Federal Reserve Board. In addition, nonbank corporations, including major conglomerates, also took advantage of the loophole in the BHCA by acquiring one bank, thus mixing banking and nonbanking. Until 1970, one bank holding companies were exempt from the strictures of the BHCA. *Id.*

162. GOLEMBE, *supra* note 149, at 2.

163. *Id.* at 13.

money, while the Federal Reserve has the power to create or extinguish money.<sup>164</sup> Hence, there is a necessary separation between the two. At times, this separation has been set aside with one agency made superior to the other. For example, to finance World War II, the Treasury demanded fixed bond prices and low interest rates. Accordingly, the Federal Reserve was forced to comply and was no longer free to conduct monetary policy, a limitation that did not end until 1951.<sup>165</sup>

Another significant factor is that the Federal Reserve is independent of the Treasury. As Allan Sproul, former president of the New York Federal Reserve Bank, once pointed out, the Federal Reserve is "independent within the government."<sup>166</sup> Therefore, it has the benefit of not being held accountable politically to the electorate.<sup>167</sup> The Treasury, on the other hand, is part of an elected administration.<sup>168</sup>

The current discord between the agencies likely began in 1996, when Comptroller Eugene A. Ludwig promulgated new rules applicable to corporate applications of national banks.<sup>169</sup> The rules established a process for a national bank to follow, which allowed operating subsidiaries of national banks to engage in any activity incidental to banking, even those banned from the parent bank.<sup>170</sup> The threat posed by the Comptroller's action was clear. A bank holding company is cumbersome and costly.<sup>171</sup> The operating subsidiary innovation could make the bank holding company obsolete or, at best, a less desirable organizational form for banks.<sup>172</sup> If holding company affiliates were largely replaced by bank subsidiaries, the basis for the Federal Reserve Board's power would be removed.<sup>173</sup> The Federal Reserve would return to being, as it had been for almost sixty years, a minor player in federal bank regulation when compared to the Comptroller of the Currency.<sup>174</sup>

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164. The powers of the Comptroller of the Currency originated in the National Currency Act of 1863 and the National Bank Act of 1864 and are codified in 12 U.S.C. §§ 1–14 (1994) and 12 U.S.C. §§ 21–215 (1994). The powers of the Federal Reserve Board originated in the Federal Reserve Act of 1913 and are codified in 12 U.S.C. §§ 221–530 (1994) and 12 U.S.C. §§ 1841–1850 (1994 & Supp. II 1997).

165. Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 BROOK. L. REV. 1295, 1302 (1995).

166. Allan Sproul, president of the New York Federal Reserve Bank from 1941 to 1956, in a classic statement on central banking in the United States.

167. GOLEMBE, *supra* note 149, at 18.

168. *Id.* at 17–18.

169. 12 C.F.R. § 5.34 (1998).

170. *Id.*

171. *The New American Universal Bank*, 110 HARV. L. REV. 1310, 1321–22 (1997).

172. *Id.*

173. GOLEMBE, *supra* note 149, at 2.

174. *Id.*

The term "turf wars" probably stems from the fact that in 1970, the Federal Reserve was given a substantial portion of the "turf" within the jurisdiction of the OCC.<sup>175</sup> Now, twenty-eight years later, the Federal Reserve is trying to protect that turf. It is interesting to note, however, the model for the Federal Reserve has always been the Bank of England, which only last year was stripped of its bank supervision and regulatory authority because of a belief that such authority is better kept separate from central banking.<sup>176</sup>

### C. *Financial Modernization Debate*

The clearest indication of the division between the two agencies is the fact that the Chairman of the Federal Reserve Board, Alan Greenspan, endorsed H.R. 10, while the Secretary of the Treasury, Robert Rubin, strongly opposed the same bill.<sup>177</sup> At issue is who should regulate nontraditional banking activities, such as insurance, securities underwriting or real estate development.<sup>178</sup> The dispute boils down to what future structure banks will be allowed to organize their non-banking activities under.

National and state chartered banks want to get into nontraditional lines of business through operating subsidiaries because the bank owns the subsidiary outright.<sup>179</sup> This allows the bank to easily move capital in and out of the companies.<sup>180</sup> Bankers and banking regulators insist that the bank and its non-banking subsidiaries would be safely segregated and would not put financial stress on one another.<sup>181</sup>

The Federal Reserve wants such activities to be placed in an affiliate of the bank holding company, where it would be the chief regulator, while the Treasury Department wants to place these activities in bank operating subsidiaries, where the Treasury's Office of the OCC would have principal

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175. Bank Holding Company Act, 12 U.S.C. §§ 1841–1850 (1994 & Supp. II 1997) (granting the Federal Reserve power to regulate bank holding companies).

176. Carter H. Golembe, *Bank of England Loses Regulatory Role: Lessons for the U.S.*, BANKING POL'Y REP., June 16, 1997, at 1.

177. *Competition in the Financial Services Industry: Hearing Before the Senate Banking, Housing and Urban Affairs Comm.*, 105th Cong. (1998) (statements of Treasury Secretary Robert Rubin and Federal Reserve Chairman Alan Greenspan).

178. *Id.*

179. Bevis Longstreth & Ivan E. Mattei, *Organizational Freedom for Banks: The Case in Support*, 97 COLUM. L. REV. 895 (1997).

180. *Id.*

181. *Id.*

regulatory supervision.<sup>182</sup> In testimony at the June 17, 1998 Senate Banking Committee hearings on competition in the financial services industry, Treasury Secretary Robert Rubin noted that the elected administration is accountable for economic policy, with bank policy being a key component of economic policy. Robert Rubin testified “[u]nder H.R. 10,<sup>183</sup> banks would gravitate away from the national banking system and the elected administration would lose its nexus with the banking system . . . .”<sup>184</sup>

The Federal Reserve supports the bill because it believes that permitting riskier financial activities, to be conducted through an operating subsidiary, would extend the safety net subsidy and, in doing so, would jeopardize the deposit insurance fund.<sup>185</sup> In summing up the Federal Reserve’s position, Chairman Greenspan testified “[w]e believe that an expansion of the national bank charter would be a mistake for bank safety and soundness, the deposit insurance funds and safety net, the financial services industry (consumers and businesses alike), and the taxpayer.”<sup>186</sup> The Federal Reserve wants financial conglomerates organized in holding companies so that affiliates are adequately separated and capital is segregated among the various businesses owned by the parent firm.<sup>187</sup>

What neither Rubin, nor Greenspan, nor many of the others involved on both sides like to point out is that each regulatory agency has a vested interest in the outcome. Should the operating subsidiary approach win, the Comptroller and Treasury would hold on to regulatory turf through oversight of national banks. On the other hand, should the holding company structure be adopted, the Federal Reserve would acquire vast new powers to regulate the new financial conglomerates that would form into holding companies among banks, insurers, and securities firms.

## VII. THE IMPACT OF THE CITICORP-TRAVELERS MERGER

The creation of Citigroup has been reported as the much needed catalyst that will move Congress to amend the law and allow affiliations among banks, insurers, and securities firms. Shortly after the public announcement of Citigroup, the original sponsor of H.R. 10, House Banking Chairman, Jim

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182. *Competition in the Financial Services Industry: Hearing Before the Senate Banking, Housing and Urban Affairs Comm.*, 105th Cong. (1998) (statements of Treasury Secretary Robert Rubin and Federal Reserve Chairman Alan Greenspan).

183. Financial Services Act of 1998, H.R. 10, 105th Cong. (1998).

184. *Competition in the Financial Services Industry: Hearing Before the Senate Banking, Housing and Urban Affairs Comm.*, 105th Cong. (1998) (statement of Robert Rubin, Treasury Secretary).

185. *Id.*

186. *Id.*

187. *Id.*

Leach, issued a statement affirming that the merger emphasizes the need for Congress to pass financial services reform.<sup>188</sup>

Citibank, a federally chartered bank holding company, would have been unable to complete the deal if they applied to the Federal Reserve to buy Travelers, because it is illegal for banks to engage in Travelers' business of underwriting property and casualty insurance.<sup>189</sup> Instead, Travelers applied to the Federal Reserve in May for a new bank holding company charter and the new holding company will acquire Citibank.<sup>190</sup> Under the Bank Holding Company Act,<sup>191</sup> new bank holding companies are allowed two years to divest nonconforming businesses, and the Federal Reserve is allowed to grant as many as three one-year extensions to the divestiture period.<sup>192</sup> This would give Citigroup up to five years to lobby Congress to change the laws.<sup>193</sup> The rules, of course, were written to give companies time to get rid of unacceptable businesses, not to figure ways to keep or acquire them.

H.R. 10 appeared to be shelved until Travelers and Citibank announced the Citigroup merger.<sup>194</sup> Unsettled disputes among regulators, consumer groups, insurance agents, and financial services firms prevented H.R. 10 from reaching the floor in late March.<sup>195</sup> That was only days before the Citigroup deal was announced and before the two companies said they expected legislative changes that would allow banks to underwrite insurance.

After a flurry of last minute lobbying and arm twisting among the various constituencies, H.R. 10 was expected to be voted on by the full House on May 7, 1998.<sup>196</sup> It was postponed again amid reports that support was waning.<sup>197</sup> Among the lobbyists was Travelers Chief Executive Officer, Sanford Weill, who flew to Washington to persuade congressmen and convince Treasury Secretary Robert Rubin to ease the department's opposition to the bill.<sup>198</sup>

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188. Richard W. Stevenson, *Financial Services Heavyweights Try Do-It-Yourself Deregulation*, N.Y. TIMES, Apr. 7, 1998, at A1.

189. The Glass-Steagall Act is the term customarily used to refer to four sections of the Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997); 12 U.S.C. §§ 78, 377, 378 (1994)).

190. Loewenberg, *supra* note 143.

191. Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c)(6) (1994 & Supp. II 1997); 12 C.F.R. § 225.137 (1998).

192. *Id.*

193. *Id.*

194. Loewenberg, *supra* note 143.

195. *Id.*

196. *Id.*

197. *Id.*

198. Stevenson, *supra* note 188.

If the Financial Services Act of 1998, H.R. 10, does not become law this year, Citigroup has several alternatives, one might even say an “umbrella” of options.<sup>199</sup> The simplest option for Citigroup would be to divest its insurance underwriting businesses. It might seem odd for an insurer and a bank to merge only to get rid of insurance, but not all of that business is underwriting, much of it is sales and distribution. At the April 29, 1998 Hearing of the House Banking and Financial Services Committee, Citicorp’s general counsel, John J. Roche, testified that he understood the public’s confusion of why two companies would merge if they thought they would have to divest important parts of the business.<sup>200</sup> Mr. Roche emphasized that the merger was about distribution and that they thought Citigroup would be able to retain the insurance distribution side of the business.<sup>201</sup> He did underscore, however, that if faced with divestiture, Citigroup would divest itself of the underwriting business to conform with the law.<sup>202</sup> To facilitate this possibility, Travelers would keep its property and casualty company separate.<sup>203</sup> The property and casualty company already trades on the New York Stock Exchange with seventeen percent of its shares owned by the public.<sup>204</sup> Mr. Roche also estimated that only twenty percent of Citigroup’s projected profits would be lost if they were forced to divest.<sup>205</sup> In fact, Citigroup could spin off the underwriting business and merge it with another underwriter. As early as the Spring of 1998, analysts expected CNA Financial Corporation to merge with Travelers Group.<sup>206</sup>

Merging Travelers’ life insurance business with a similar company would be more difficult because it is wholly owned. Selling it would also be undesirable considering the tremendous opportunities to market products like variable annuities to customers of Citicorp and Salomon Smith Barney. However, Citibank does have a life insurance subsidiary in Delaware that was grandfathered in under the Bank Holding Company Act.<sup>207</sup> Whether the subsidiary retains its grandfathered status, assuming the merger is approved, remains to be seen.

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199. H.R. 10, 105th Cong. (1998).

200. *Financial Services Mergers: Hearing Before the House Banking and Financial Services Comm.*, 105th Cong., (1998) (statement of John J. Roche, general counsel for Citicorp).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Financial Services Mergers*, *supra* note 200.

206. Melissa Wahl, *Buffett’s bid for General Re puts reinsurers in the spotlight*, CHI. TRIB., June 26, 1998, § 3, at 1.

207. 12 U.S.C. § 1843(a)(2) (1994 & Supp. II 1997); 12 C.F.R. § 225.137 (1998).

If the current laws are not changed, Citigroup could also consider debanking. Debanking ranges from actually dropping the bank charter to spinning off complete lines of business. The easiest of this broad spectrum is the option of giving up its banking charter and flipping to a thrift charter.<sup>208</sup> A thrift charter is much more liberal than a bank charter and might permit Citigroup to keep its business intact. Citibank has operated thrifts for years and Travelers recently obtained a thrift charter.<sup>209</sup> One of the reasons Citibank opposed H.R. 10 before the merger was because the proposed bill would have eliminated thrift charters.<sup>210</sup> As a unitary thrift holding company, Citigroup could retain its retail branches with their deposits in a thrift subsidiary. However, thrifts must maintain at least sixty-five percent of their loans in mortgage, consumer or education-related assets.<sup>211</sup> Up to twenty percent of their assets can be in commercial loans, providing that half are loans to small businesses.<sup>212</sup> The loans Citigroup could not accommodate in the thrift subsidiary could be participated to Salomon Smith Barney, as an affiliate. There are some substantial drawbacks to this option. As a thrift, Citigroup would no longer have access to the Federal Reserve Bank's discount window for borrowings and it would be supervised by the Office of Thrift Supervision, which does not qualify as a "comprehensive supervisor" under international guidelines.<sup>213</sup>

The more impractical debanking option would be for Citigroup to liquidate its bank charter. Assuming Citigroup truly wanted to debank, it would have to pay off or sell its huge amounts of deposits, which would require alternative funding. A company that debanks can no longer take

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208. Lissa Lamkin Broome, *The Influence of Enhanced Thrift Institution Powers on Commercial Bank Market Expansion*, 67 N.C. L. REV. 795, 818-19 (1989).

209. In November 1997, Travelers Group received approval to convert its Delaware chartered commercial bank to a federal thrift charter. The new institution, Travelers Bank & Trust, will act as a subsidiary of Commercial Credit Co., a subsidiary of Travelers Group. OTS Order No. 97-120 (Nov. 24, 1997).

210. Loewenberg, *supra* note 143.

211. Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 & 15 U.S.C.). This statute blurred the lines between banks and thrifts by allowing all depository institutions to offer interest bearing checking accounts, write residential mortgage loans and make consumer loans. *Id.* DIDMCA also preempted state usury ceilings on mortgage loans, allowed federal thrifts to branch statewide and permitted all associations to put up to 20 percent of their assets in commercial loans and corporate debt instruments. *Id.*

212. *Id.*

213. Daniel M. Laifer, *Putting the Super Back in the Supervision of International Banking, Post-BCCI*, 60 FORDHAM L. REV. S467 (1992) (noting it was the lack of comprehensive supervision that allowed the Bank of Credit and Commerce International (BCCI) to create a multi layered operation which effectively eluded supervision, thereby concealing the fraudulent practices for which that bank was later dissolved).



government insured deposits.<sup>214</sup> It would have to look to funding sources such as commercial paper or other forms of debt and equity. This may not be practical since consumer deposits accumulated through a retail branching system are much cheaper than purchased money.<sup>215</sup> Although debanking seems drastic, Wells Fargo seriously considered trading their bank charter for a thrift charter in 1993 to achieve greater freedom than banks enjoyed at the time.<sup>216</sup> In addition, ING Groep NV, a Dutch financial services company, actually liquidated its New York state bank charter so it could merge with an insurance company.<sup>217</sup>

Another radical option would be for Citigroup to relocate outside the United States. They could choose to be regulated by an agency such as the Bank of England. Citicorp's chairman John S. Reed has acknowledged in the past that Citicorp had considered a plan to incorporate offshore.<sup>218</sup>

### VIII. CONCLUSION

Whether we realize it or not, Glass-Steagall has maintained the safety and soundness of our banking industry. While reform is necessary for our financial services industries to compete in the global marketplace, legislation must be carefully crafted to ensure safety and soundness. The real question is whether Congress is up to the task or whether the market will find its own way of circumventing outmoded laws and restrictive regulations through other administrative and agency rulings. Technically, under Glass-Steagall, Citicorp has two years to divest its insurance holdings after the merger.<sup>219</sup>

On the other hand, many members of Congress may regard the two, and possibly five, year grace period as their own grace period for passing financial reform. Members may convince themselves that rather than voting

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214. See 12 U.S.C. § 1811 (1994) (authorizing chartered depository institutions only to apply to the FDIC for deposit insurance purposes); see also 12 U.S.C. § 1813(a) (1994) (defining a bank as any national, state or district bank, or any federal branch or insured branch).

215. Helen A. Garten, *Regulatory Growing Pains: A Perspective on Bank Regulation in a Deregulatory Age*, 57 *FORDHAM L. REV.* 501, 516 (1989).

216. Steve Cocheo & William Streeter, *Breakaway Strategies*, ABA BANKING J., Jan. 1996, at 32 (stating that during this time, interstate banking was not allowed, nor could banks sell securities or mutual funds).

217. *Id.*

218. Fred R. Bleakley, *Weakened Giant: As Big Rivals Surge, Citicorp's John Reed is at a Crossroads*, WALL ST. J., Aug. 16, 1991, at A1.

219. See Glass-Steagall § 16 (codified at 12 U.S.C. § 24 (Seventh) (1994 & Supp. II 1997); Bank Holding Company Act, 12 U.S.C. §§ 1841-1850 (1994 & Supp. II 1997); Federal Reserve Board Regulation Y, 12 U.S.C. §§ 1841-1843 (1994 & Supp. II 1997), 12 U.S.C. § 1847 (1994).

immediately on a complicated bill they do not really understand, Congress now has the luxury of this grace period to take testimony from interested parties on the implications of the merger. At the end of the grace period, Congress would be placed in a terrible dilemma. If it does nothing, Citigroup could be forced into a divestiture, something that may well disrupt financial markets. This would be compounded if, as expected, other major insurance company and bank mergers occur in the meantime.<sup>220</sup> Critics will charge that a lot of middle income Americans that invest in the financial markets through pension plans and mutual funds will suffer greatly from the fallout of divestiture.

To avoid these consequences, Congress will have little choice except to enact a bill that, in effect, ratifies the then existing situation. Ratifying where the market ends up evolving would not provide for issues such as functional regulation, consumer protections, and others currently provided for under the Financial Services Act of 1998, H.R. 10. Although passage in 1998 is uncertain due to Congressional time constraints, it appears increasingly probable that some form of legislation ultimately will be enacted, hopefully, sooner, rather than later.

*Laura J. Cox\**

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220. Gene G. Marcial, *Inside Wall Street: Romance for Amex and AIG?*, BUS. WK., Apr. 27, 1998, at 110 (quoting Robin Manners West, an investment manager who had correctly predicted the Banc One acquisition of First Chicago NBD, as suggesting American Express and AIG may be considering a merger in order to compete against Citigroup).

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# *United States v. Bestfoods*: Decree on Parent Corporation Liability for Illegal Discharges Made by Subsidiaries Under the Comprehensive Environmental Response, Compensation, and Liability Act

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## I. OVERVIEW

Prior to the United States Supreme Court Decision in *United States v. Bestfoods*<sup>1</sup> on June 8, 1998, there had been a decade of confusion and anxiety over parent corporation liability<sup>2</sup> under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>3</sup> The ruling in *Bestfoods* makes it much more likely that future decisions will be uniform, balanced, and precise with regard to parent corporation liability for its subsidiary's illegal discharges.<sup>4</sup> The resolution of corporate parent

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1. 118 S. Ct. 1876 (1998) (Souter, J., unanimous decision).

2. Stephen L. Kass & Jean M. McCarroll, *Environmental Law: Corporate Parent Liability under CERCLA*, 219 N.Y. L.J. 3, 3 (1998).

3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994 & Supp. 1996).

4. Kass, *supra* note 2, at 3.

liability under CERCLA is important because there are a large number of hazardous waste disposal sites covered by CERCLA which are owned and operated by poorly capitalized subsidiary corporations that have well capitalized parent corporations.<sup>5</sup> Defining the standard by which a parent may be held liable, due to the parent's good capitalization, will allow the government to replenish the Superfund under which CERCLA operates. Thus, facilitating increased cleanup activities at hazardous sites.<sup>6</sup>

The intent of this note/comment is threefold. First, this note/comment provides an opportune tangent into the intricacies of CERCLA as it applies to the modern industrial polluter and parent corporation liability. Second, a detailed description of the *Bestfoods* case and its history will put a very obscure principle, which is fundamental to the resolution of environmental woes<sup>7</sup> in a clean and understandable context. By looking into the arguments of both sides of the case it will become clear why and how the United States Supreme Court reached its decision and what issues were left unresolved. The preceding history of the case will demonstrate the lack of uniformity between courts in considering the issue of parent corporation liability under CERCLA. In conclusion, this note/comment will enumerate the political, social, environmental, legal, and economic ramifications of the Court's ruling in *Bestfoods*.

## II. INTRODUCTION

There is no area of law more fundamental to our human existence than environmental law. However, environmental issues are often overlooked because they threaten the capitalist's primary goals of attaining wealth and economic growth.<sup>8</sup> After three hundred years of exploiting the once fertile United States and several years of depleting its energy still further by dumping synthetic chemicals, there are apples that taste like tennis balls, oranges that taste like cardboard, and pears that taste like sweetened Styrofoam.<sup>9</sup> But alas, where certain evils could be abolished with a "stroke of the pen, chemical pollution [can] not."<sup>10</sup> The United States has hundreds

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5. See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 987 (1986) [hereinafter *Harvard Liability*].

6. See Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases under CERCLA*, 24 U.S.F. L. REV. 421, 423 (1990).

7. See *id.*

8. See Vice President Al Gore, *Introduction* to RACHEL CARSON, *SILENT SPRING* xv, xv-xxvi (Houghton Mifflin Company 1994) (1962).

9. BENJAMIN HOFF, *THE TAO OF POOH* 101 (Penguin Books 1982).

10. GORE, *supra* note 8, at xix.

of hazardous waste disposal sites and an estimated 10,000 sites which will eventually be considered Superfund sites.<sup>11</sup>

With haste,<sup>12</sup> Congress passed CERCLA in 1980 after many highly publicized abandoned hazardous waste disposal sites were found throughout the United States.<sup>13</sup> Many of these sites had already damaged the environment and human health “through the contamination of drinking water supplies” and protein digestion in livestock.<sup>14</sup> The main objective of CERCLA is to clean up the nation’s hazardous waste sites<sup>15</sup> by imposing liability broadly on all parties who may have been potentially responsible for the disposal of the waste.<sup>16</sup> CERCLA allows The Environmental Protection Agency (“EPA”) to bring actions to recover damages for past and future cleanup costs.<sup>17</sup> These cleanup costs can run into “the tens of millions of dollars for each site.”<sup>18</sup>

CERCLA is essentially a strict liability statute requiring only: a release of hazardous substances, at a facility, which causes injuries to the plaintiff<sup>19</sup> and a defendant who is a responsible party as defined by the Act.<sup>20</sup> There is no need for culpability to be held liable under CERCLA.<sup>21</sup> However, the statute is “not [a] model of legislative draftsmanship,”<sup>22</sup> as it provides no direct means of imposing parent corporation liability for the illegal acts of their subsidiaries.<sup>23</sup> Nevertheless, nothing in CERCLA precludes parent liability either.<sup>24</sup> Allowing parent corporations<sup>25</sup> “to escape CERCLA liability undermines the [entire] purpose of the Act”<sup>26</sup> because the parent

11. Aronovsky, *supra* note 6, at 421–24.

12. *Harvard Liability*, *supra* note 5, at 987.

13. Aronovsky, *supra* note 6, at 425.

14. *Id.*

15. *Id.* at 422.

16. *Harvard Liability*, *supra* note 5, at 986.

17. *See* *United States v. Cordova Chem. Co. of Mich.*, 750 F. Supp. 832, 834 (W.D. Mich. 1990), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

18. Joel Glass, *Test Shows when Firms Must Pay Price*, LLOYD'S LIST INT'L, June 17, 1998, at 9.

19. The plaintiff may be a normal citizen or a state or federal appointed enforcement bureau. 42 U.S.C. § 9659 (1994).

20. *Id.*

21. *See* *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1276 (W.D. Mich. 1991).

22. Brief for Respondent Bestfoods at 2, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454).

23. Aronovsky, *supra* note 6, at 422.

24. *Id.* at 437.

25. Parent corporations are so called because of their control through ownership of the corporate stock of their subsidiary. *United States v. Bestfoods*, 118 S. Ct. 1876, 1884 (1998).

26. *Harvard Liability*, *supra* note 5, at 987.

corporations usually have the deeper pockets and can more adequately reimburse the aggrieved party under the Act.<sup>27</sup> The difficulty in identifying the responsible parties under the Act<sup>28</sup> has been enunciated in the varying decisions across the United States regarding parent liability under CERCLA.<sup>29</sup>

Since CERCLA's enactment, many courts have built an increasingly "confused web" of statutory interpretation regarding parent liability.<sup>30</sup> Before the *Bestfoods* ruling, the First, Second, Third, Sixth, and Eleventh Circuit Courts of Appeals all differed on what standard to apply in order to find parent corporation liability.<sup>31</sup> Indeed, the case law relied upon in *Bestfoods* reflects the widely divergent view that courts take in regard to parent corporation liability; some require a piercing of the corporate veil, while others require only a small degree of control by the parent over the subsidiary.<sup>32</sup> In addition, there is widespread conflict between jurisdictions whether to apply state corporate law or to develop a federal corporation law

27. *See id.*

28. Aronovsky, *supra* note 6, at 425.

29. *Bestfoods*, 118 S. Ct. at 1884 n.8 (1998) (citing an exhaustive number of cases which illustrate the divergent views that different circuits hold in relation to parent corporation liability under CERCLA).

30. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 2, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454).

31. *See* Respondent Michigan Department of Environmental Quality's Brief in Support of Petitioner at 14, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454) (citing *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993); *John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990); *but see Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990)).

32. *Compare Martignetti v. Hairg-Farr, Inc.*, 680 N.E.2d 1131, 1138 (Mass. 1997) (using an actual control test to find parent liability), *with Trinity Indus., Inc. v. Dixie Carriers*, No. 90-2349, 1992 WL 161123, at \*3 (E.D. La. June 24, 1992) (requiring that plaintiff establish circumstances that require court to pierce the corporate veil), *and Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (requiring corporate veil to be pierced, but billing it as direct CERCLA liability), *with United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (requiring only that parent control the "operations" of the subsidiary itself), *with Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (extends liability to all those involved in creating harmful environmental conditions), *with Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220 (3d Cir. 1993) (parent is only liable where corporate veil can be pierced), *with Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (finds liability when parent exercises actual and pervasive control in daily operations of subsidiary), *with Burnet v. Clark*, 287 U.S. 410, 415 (1932) (holding a corporation and stockholders to be separate entities).

framework for use in interpreting CERCLA liability.<sup>33</sup> While the *Bestfoods* decision resolved many of these conflicts, other conflicts still persist.<sup>34</sup>

The *Bestfoods* case has been closely monitored by environmental, maritime, insurance, legal, and aviation groups.<sup>35</sup> In *Bestfoods*, Justice Souter held that a parent corporation could be held liable for the illegal discharges made by its subsidiary in either of two ways.<sup>36</sup> First, a parent can be held liable under CERCLA for acts of its subsidiary through direct operator status.<sup>37</sup> Thus, if the parent controls the subsidiary's polluting facility, it will be held liable, but a parent is not liable when it controls only the operations of the subsidiary's business.<sup>38</sup> The parent is essentially liable for its own acts as operator of a subsidiary owned facility.<sup>39</sup> The second way in which a parent can be held liable is indirect or derivative liability.<sup>40</sup> Indirect liability occurs through a process called piercing the corporate veil. If and only if the corporate veil can be pierced may a parent be charged with derivative or indirect liability under CERCLA.<sup>41</sup> The *Bestfoods* decision also addresses specific factors that can be applied in evidencing either a piercing of the corporate veil or direct operator liability.<sup>42</sup> It is critical to understand that there is a significant difference between liability through the corporate veil and liability through direct operator status under CERCLA.<sup>43</sup> This definitive ruling settled a long standing area of confusion and may lead to uniformity in court decisions, but there may be derogatory consequences in light of the rules promulgated in *Bestfoods*.<sup>44</sup>

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33. Compare *Burks v. Lasker*, 441 U.S. 471, 476-77 (1979) (holding that while statutes may fashion a complete body of federal law, corporation law is reserved to the states), and *United States v. Texas*, 507 U.S. 529, 534 (1993) (holding there is a presumption that long-established and familiar principals of state law will govern), with *Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986) (holding federal statutory powers preemptive over state law).

34. See Kass, *supra* note 2, at 3.

35. Glass, *supra* note 18, at 9.

36. *United States v. Bestfoods*, 118 S. Ct. 1876, 1886-87 n.12 (1998).

37. *Id.* at 1881.

38. *Id.* at 1886.

39. See *id.*

40. *Id.* at 1885-86.

41. *Bestfoods*, 118 S. Ct. at 1885-86.

42. *Id.* at 1888.

43. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994).

44. *Bestfoods*, 118 S. Ct. at 1876.

### III. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

The Comprehensive Environmental Response, Compensation, and Liability Act is not as comprehensive as its title suggests. While CERCLA covers not less than ninety-four pages in the United States Code, including definitions, response authorities, liability, presidential delegation of powers, and pollution insurance, it does not address something as fundamental to the remediation of hazardous waste sites as parent corporation liability.<sup>45</sup> Neither, the legislative history nor the text of the statute provides indications that Congress intended or did not intend parent corporation liability for the acts of subsidiaries.<sup>46</sup> In general, the legislative history for CERCLA is relatively sparse, and its provisions are vague.<sup>47</sup> Nevertheless, the statute and its legislative history are complete enough to allow courts to employ an effective statutory construction scheme starting with the language in the statute itself.<sup>48</sup> The language in CERCLA is lengthy and complex.<sup>49</sup> Therefore, a brief discussion of the statute is warranted in order to put *Bestfoods* and other parent corporation liability cases into the proper perspective.

The main objective of CERCLA is to take decisive action to cleanup or otherwise make benign the nation's leaking waste sites.<sup>50</sup> It is remedial legislation that protects the environment and public health by imposing retroactive liability.<sup>51</sup> The statute was designed to be comprehensive and gives the President broad power to mandate that private parties and government agencies alike remediate hazardous waste sites.<sup>52</sup> The President automatically delegated most of his authority to the EPA in 1981.<sup>53</sup> CERCLA not only imposes costs on those who are actually responsible for contamination, damage, injury from chemical poisons, and environmental harm,<sup>54</sup> but it is also designed to encourage voluntary cleanup by private

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45. 42 U.S.C. §§ 9601–9675 (1994 & Supp. 1996).

46. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 18, *Bestfoods* (No. 97-454).

47. See *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584, 588 (6th Cir. 1995), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

48. See *Bailey v. United States*, 516 U.S. 137, 144 (1995).

49. 42 U.S.C. §§ 9601–9675 (1994 & Supp. 1996).

50. Aronovsky, *supra* note 6, at 422.

51. See *Cordova Chem. Co. of Mich.*, 59 F.3d at 588.

52. *United States v. Bestfoods*, 118 S. Ct. 1876, 1881 (1998) (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)).

53. See Petitioner's Brief at 5, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454).

54. *Bestfoods*, 118 S. Ct. at 1882.



parties.<sup>55</sup> Congress' intent was to limit the defenses that might exist under state law with regard to the environment<sup>56</sup> and to abrogate indemnity agreements which hinder holding responsible parties liable.<sup>57</sup> CERCLA's final goal is to prevent the actual discharge of waste in the first place by implementing a "national hazardous substance response plan," and putting potentially liable parties on notice of impending CERCLA claims if no remedial action is taken at the site.<sup>58</sup>

CERCLA created a "Superfund" into which monies are deposited to help cleanup the sites that pose the most environmental danger.<sup>59</sup> The EPA's job is to recover past and future costs associated with the cleanup plan for each site in order to replenish the Superfund.<sup>60</sup> Each site typically requires tens of millions of dollars to implement a long-term cleanup plan.<sup>61</sup> The key to CERCLA is to pay for environmental cleanup at the expense of private responsible parties instead of taxpayers.<sup>62</sup> The CERCLA Superfund receives a stipend from the government each year in excess of eight billion dollars,<sup>63</sup> which is mainly derivative from taxes on the oil and gas industry.<sup>64</sup> However, the estimated cost of cleaning up the possible 10,000 national Superfund sites is three hundred billion dollars.<sup>65</sup> For this cost related reason, only a very small number of sites are actually being detoxified,<sup>66</sup> and less than eleven percent of those sites are being funded by private responsible parties. The remaining ninety percent of the cost is "being shouldered" by the government, *i.e.* the taxpayers.<sup>67</sup>

Courts have required several elements to establish liability under CERCLA. The site, which is the subject of the action, must be considered a facility.<sup>68</sup> There must have been a release or threatened release of hazardous

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55. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 14-15, *Bestfoods* (No. 97-454).

56. 42 U.S.C. § 9607(b) (1994).

57. *Id.* § 9607(e).

58. *Id.* §§ 9605(a), (c).

59. *Id.* § 9611.

60. See generally *United States v. Codova Chem. Co. of Mich.*, 750 F. Supp. 832, 835 (W.D. Mich. 1990), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

61. See Glass, *supra* note 18, at 9.

62. Aronovsky, *supra* note 6, at 422-23.

63. See *id.* at 425.

64. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 17, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454).

65. Aronovsky, *supra* note 6, at 424.

66. See *id.*

67. *Id.* at 425.

68. See, e.g., *United States v. Moore*, 703 F. Supp. 455, 461 (E.D. Va. 1988).

materials which occurred at the facility.<sup>69</sup> Such release must have caused the plaintiff to incur costs to respond to the release.<sup>70</sup> Additionally, the defendant must be a responsible party as defined by CERCLA.<sup>71</sup>

The terms "release" and "facility" have been broadly interpreted by courts so that they never pose a significant obstacle to the imposition of liability.<sup>72</sup> Under CERCLA, a facility is defined as:

Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft or [ ] any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.<sup>73</sup>

This broad definition has led to little or no leeway in arguing that one's site is not a facility. Courts have clarified that a facility is only the immediate area where the hazardous waste has "come to be located" and not the entire property on which the waste is located.<sup>74</sup> Likewise, disposal occurs not only through active human conduct, but also refers to passive movements of hazardous waste through soil, metal, bodies of water, or other means.<sup>75</sup> The critical determination in CERCLA liability lies in identifying the responsible party as defined by the act.

The idea of holding responsible parties liable does not impute a necessity of culpability.<sup>76</sup> CERCLA casts a wide net to help pay the costs of cleaning up the environment.<sup>77</sup> The act is "sweeping" in that every party that may be potentially involved in the disposal of hazardous materials should be forced to contribute to cleanup efforts at the site in question.<sup>78</sup> Even some of

69. *See id.*

70. *Id.*

71. *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 570 (W.D. Mich. 1991), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

72. Aronovsky, *supra* note 6, at 429.

73. 42 U.S.C. § 9601(9) (1994).

74. *E.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842-43 (4th Cir. 1992).

75. *See, e.g., id.* at 845.

76. *Id.* at 846.

77. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 21, *Bestfoods* (No. 97-454).

78. *United States v. Bestfoods*, 118 S. Ct. 1876, 1882 n.1 (1998) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989)).

the several states have been held liable under the statute for their actions in releasing already deposited waste during public works projects.<sup>79</sup>

CERCLA lists the persons who may be held liable for the cleanup costs associated with a polluted site.<sup>80</sup> Those persons include any prior owner or operator of the facility whose involvement coincided with the release of the hazardous substance, any present owner or operator of the facility, any person who arranged for the disposal or transport of the hazardous substance from the facility, and any person who, by contract or otherwise, actually transported or disposed of the materials.<sup>81</sup> The liability for these owners, operators, arrangers, and transporters arises from their definite and real relationship with the facility where the dangerous materials were released into the ecosystem.<sup>82</sup> A person is defined to include corporations.<sup>83</sup> To operate a facility means to direct the workings of or to manage the facility.<sup>84</sup> It is readily apparent that CERCLA was created to hold liable any entity that was remotely connected with the illegal discharge of hazardous waste into the environment. By holding past and present owners, operators, transporters, and arrangers jointly and severally liable for toxic discharges, CERCLA attempts to maintain a safety net of cleanup funds.<sup>85</sup>

The comprehensiveness of the responsible party section under CERCLA is important to understand. Even an entity that owns a non-operational facility is liable under CERCLA if toxic discharges were made before the facility went offline.<sup>86</sup> A tenant who exercises control and authority over a facility can be held liable as well as the owner of the facility that the tenant rents.<sup>87</sup> It follows then that no parties who were affiliated with the polluting facility in some way can escape liability after a release of hazardous substances is facilitated.

This assessment, however, is incorrect because there is an entire body of corporate America that can escape liability based on their status as a

79. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

80. 42 U.S.C. § 9607(a) (1994).

81. *Id.* § 9607(a)(1)–(3).

82. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 4, *Bestfoods* (No. 97-454).

83. 42 U.S.C. § 9601 (21) (1994).

84. Petitioner's Brief at 20, *Bestfoods* (No. 97-454) (internal quotations omitted) (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

85. *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 554 (W.D. Mich. 1991) (holding CERCLA a joint and several liability statute unless defendant proves that the harm is divisible).

86. See Petitioner's Reply Brief at 8, *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) (No. 97-454).

87. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992).

parent corporation.<sup>88</sup> CERCLA does not impose direct liability on parent corporations for illegal discharges made by their subsidiaries.<sup>89</sup> Likewise, an officer of a corporation that is liable under CERCLA is usually immune from the statute except where that officer plays a role in the polluting activities of the corporation.<sup>90</sup> It is up to the courts to interpret CERCLA to determine under what conditions a parent will be held liable based on CERCLA, federal, and state laws.

CERCLA's inherent limitations often confine its ability to remedially enforce its provisions and obtain funds from potentially liable sources. The Act does not require that federal law be used in interpreting its provisions.<sup>91</sup> This leads to enforcement difficulties when trying to hold a parent liable for the acts of its subsidiary because corporation law is derived from state power and state common law.<sup>92</sup> The law presumes that long established and familiar principles of state law will govern unless a federal statute provides otherwise.<sup>93</sup> CERCLA, therefore, does not cast the widest net available to remedy environmental woes because the traditional corporate form protects parent companies.<sup>94</sup> The phrase "corporations will be held liable" does not suggest that the same corporation's shareholders will be held liable.<sup>95</sup> Therefore, when CERCLA's text states that a "corporation"<sup>96</sup> may be held liable, it does not require that the parent corporation, the corporation's principal shareholder, will be held liable. It may be reasonably concluded, then, that CERCLA's direct text does not tamper with traditional state notions of limited liability for corporations.<sup>97</sup> This may explain why CERCLA has been "subjected to a myriad of legal attacks since its enactment [,]" regarding when and to what extent parent corporations may be held liable for violations of its provisions.<sup>98</sup>

CERCLA provides one limited defense to those parties who are innocent purchasers of contaminated property.<sup>99</sup> The defense provides that

88. See *Joslyn Mfg. Co. v. T.L. James Co.*, 893 F.2d 80, 82 (5th Cir. 1990).

89. *Id.*

90. *United States v. Cordova Chem. Co. of Mich.*, 21 ENVTL. L. REP. 20805, 20805 (W.D. Mich. 1991).

91. See Amicus Brief of the Washington Legal Foundation in Support of Respondents at 4, *Bestfoods* (No. 97-454).

92. See *United States v. Texas*, 507 U.S. 529, 534 (1993).

93. *Id.* at 534.

94. See *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584, 589 (6th Cir. 1995), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

95. Respondent's Brief at 20, *Bestfoods* (No. 97-454).

96. 42 U.S.C. § 9601(21) (1994).

97. Glass, *supra* note 18, at 9.

98. See Aronovsky, *supra* note 6, at 427.

99. 42 U.S.C. § 9607(b)(3) (1994).

there will be no liability for an otherwise liable party if “an act or omission of a third party other than an employee or agent of the defendant” resulted in an illegal release, which was caused solely by that third party, and the otherwise liable party “exercised due care with respect to the hazardous substances concerned” and “took precautions against foreseeable acts or omissions” by the third party.<sup>100</sup> However, if the act or omission on the part of the third party was in relation to a contractual relationship regarding the hazardous substance of which the owner was a party, the defense will not work.<sup>101</sup> A release caused by an act of war or God will also remove liability from any owner.<sup>102</sup>

In addition, a claim by a previous owner that he or she sold the hazardous material, and its liability with it, will not succeed<sup>103</sup> because CERCLA imposes strict liability on all previous owners.<sup>104</sup> This is true regardless of the duration of the ownership of the facility.<sup>105</sup> These defenses are the extent of affirmative defenses available to defeat CERCLA liability. The only other defense available is to disprove the liability on the merits and the elements.

The courts, in enforcing and interpreting CERCLA, have proven to be a powerful ally to the statute. The courts generally construe CERCLA broadly, paying particular attention to its remedial purpose, and make rulings that flow from policy considerations rather than abstract legal principles.<sup>106</sup> Courts recognize that Congress gave the statute wide latitude to shift the costs of cleanup actions under the CERCLA from public entities to private responsible parties.<sup>107</sup> Therefore, the courts usually follow the route to a cleaner environment proscribed in CERCLA and defer to its remedial purpose.<sup>108</sup>

The nation's courts have prescribed rights that defendants have under the statute. It is well settled that private responsible parties may make binding and enforceable agreements to apportion the cleanup costs under CERCLA between joint defendants.<sup>109</sup> Parties held liable, or parties that settle the case with the EPA, may seek contribution from any and all other

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100. *Id.* § 9607(b)(3).

101. *Id.*

102. *Id.* § 9607(b)(1)–(2).

103. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 847 (4th Cir. 1992).

104. *Id.* at 841.

105. *See id.* at 844.

106. *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 571 (W.D. Mich. 1991), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

107. *Aronovsky, supra* note 6, at 426.

108. *Id.* at 429.

109. *Cordova Chem. Co. v. Department of Natural Resources*, 536 N.W.2d 860, 863 (Mich. Ct. App. 1995).

responsible parties under the act.<sup>110</sup> Being accused of a CERCLA violation does not crush an entity's options; it simply forces someone involved, and possibly everybody involved, to cleanup his or her own mess.

CERCLA, in one overly complex statement, provides that the United States can no longer tolerate short-term economic gain at the expense of long-term environmental health.<sup>111</sup> The true costs of producing environmentally harmful chemicals must fall upon those who profit from their production. The preceding discussion of the CERCLA statute will assist in a proper understanding of the information in the proceeding sections. An entire body of law has arisen out of the complexities contained in CERCLA. This body of law incorporates everything from simple civil procedure issues to complex issues of state versus federal law.

#### IV. THE LIABILITY THEORIES PRECEDING *BESTFOODS*

Because CERCLA does not speak directly to the issue of parent corporation liability for the acts of subsidiaries, the courts were left to struggle with the concept in order to find a resolution that preserved the corporate form but allowed liability where it was deserved. The courts always start with the language included in the statute when interpreting a legislative enactment.<sup>112</sup> Then, the courts must determine the meaning of a term or section in the statute by considering first its bare definition, and then its placement and purpose in the overall statutory scheme.<sup>113</sup> CERCLA's overall statutory scheme is to take decisive action to clean up or otherwise make benign the nation's leaking waste sites.<sup>114</sup> Therefore, the meaning of "persons"<sup>115</sup> in CERCLA must have been meant to include parent corporations if they had something to do with the waste produced. "The meaning of statutory language, plain or not, [always] depends on context."<sup>116</sup> The silence of Congress on this parent corporation liability issue has sparked widespread and nonuniform interpretation of CERCLA in the nation's courts.<sup>117</sup>

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110. 42 U.S.C. § 9613(f)(3)(B) (1994); *Trinity Indus., Inc. v. Dixie Carriers*, No. 90-2349, 1992 WL 161123 \*2 at \*8 (E.D. La. June 24, 1992).

111. *See Gore*, *supra* note 8, at xxi.

112. *Bailey v. United States*, 516 U.S. 137, 144 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

113. *Id.* at 145.

114. Aronovsky, *supra* note 6, at 422.

115. 42 U.S.C. § 9601(21) (1994).

116. *Bailey*, 516 U.S. at 145.

117. *See supra* note 33.

CERCLA provides no direct means of attaching a parent corporation for its subsidiary's acts in violation of the Act's provisions.<sup>118</sup> However, it is well known that CERCLA's general thrust is to extend liability to all parties involved in bringing about dangerous environmental conditions.<sup>119</sup> This thrust is in direct conflict with the tenet that a corporation and its stockholders must be treated as separate entities in the eyes of the law.<sup>120</sup> It is entirely acceptable that a corporation is used specifically as an insulator from liability on statutory assessments. Limited liability is a hallmark of corporation law.<sup>121</sup> However, the desirable and socially beneficial protection of limited liability must be surrendered "when the sacrifice is essential to the end that some accepted public policy may be defended or upheld."<sup>122</sup>

Although never directly stated, the courts of the United States must consider the cleanliness of the environment to be an accepted public policy because they have found several ways to limit limited liability in the CERCLA context.<sup>123</sup> The nation's courts have for the most part applied two different standards in determining whether a parent corporation can be held liable for illegal discharges made by its subsidiary. The first standard involves looking to the amount of control that the parent corporation exercises over the subsidiary; if the requisite amount of control exists, then the parent may be held liable.<sup>124</sup> The second standard involves looking closely at the relationship between the parent and the subsidiary to see if piercing the corporate veil is warranted.<sup>125</sup> There are two main theories behind piercing the corporate veil: alter ego theory and mere instrumentality theory.<sup>126</sup> However, the two theories are identical in substance and only differ in form.<sup>127</sup>

It is essential to remember that the theory of direct liability through control and the theory of derivative liability through piercing the corporate veil are separate, unique, and noninterchangeable, but they are equally as

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118. Aronovsky, *supra* note 6, at 422.

119. Schiavone v. Pearce, 79 F.3d 248, 253 (2d Cir. 1996).

120. Burnet v. Clark, 287 U.S. 410, 415 (1932).

121. See Anderson v. Abbott, 321 U.S. 349, 361 (1944).

122. *Id.* at 362 (quoting Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 95 (N.Y. 1926) (Cardozo, J.)) (internal quotations omitted).

123. See *supra* note 33.

124. See, e.g., Aluminum Co. of Am. v. Beazer E., Inc., 124 F.3d 551, 563 (3d Cir. 1997).

125. See, e.g., United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985); Aronovsky, *supra* note 6, at 423.

126. See Aronovsky, *supra* note 6, at 432.

127. See *id.* at 430-31.

effective in finding liability over parent corporations.<sup>128</sup> A conflict arose over veil-piercing regarding whether to apply state corporate veil-piercing laws or to use federal standards in the context of CERCLA. "Ultimately, the question facing the courts is whether to adhere to the traditional common law rule strictly limiting [parent] liability, or instead to look beyond the formalities of separate corporate existence and impose direct CERCLA liability on parent corporations and individual shareholders."<sup>129</sup>

Up until *Bestfoods*, the lower courts around the United States differed on whether to apply state or federal veil-piercing standards. The general consensus was that federal law governs the question of CERCLA liability, but state law is not irrelevant because "corporations are creatures of state law."<sup>130</sup> Some statutes allow courts to fashion a new body of federal law to usurp state law, but corporate law is not such a body of law.<sup>131</sup> Nevertheless, if the state law allows an action that is prohibited by the federal law or the application of state law is inconsistent with federal policy, then federal law must displace the state law.<sup>132</sup> In addition, the Fifth Circuit has ruled that federal law governs whenever a case involves the rights of the United States under a nationwide federal program.<sup>133</sup> Under these rules, it would seem that environmental protection is consistent with national policy and that a clean environment is a right of the United States as defined by CERCLA.

Notwithstanding the previous discussion, many courts hold that federal law may never intrude into veil-piercing under CERCLA. In order to abrogate state law, a federal statute must directly apply to the question addressed by the state common law.<sup>134</sup> Nothing in the legislative history of CERCLA indicates that Congress intended to alter the basic tenets of state corporation common law,<sup>135</sup> nor does the text of the statute itself indicate that federal corporate law should be presumed.<sup>136</sup> It is agreed, however, that no state may empower its corporations to disregard federal laws or policies.<sup>137</sup> Regardless of whether state or federal law is used to determine whether piecing the corporate veil is warranted, piercing the veil is the only

128. See *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994).

129. Aronovsky, *supra* note 6, at 435-36.

130. See, e.g., *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1977)).

131. *Id.*

132. See, e.g., *id.* at 479.

133. *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985).

134. E.g., *United States v. Texas*, 507 U.S. 529, 534 (1993).

135. *Joslyn Mfg. Co. v. T.L. James Co.*, 893 F.2d 80, 82 (5th Cir. 1990).

136. 42 U.S.C. §§ 9601-75 (1994 & Supp. 1996).

137. E.g., *Anderson v. Abbott*, 321 U.S. 349, 365 (1944).



indirect way in which a parent corporation can be held liable for illegal toxic releases made by its subsidiary under CERCLA.

"Piercing the corporate veil is the most litigated issue in corporate law, yet it remains among the least understood."<sup>138</sup> Veil-piercing derives from the abuse of the corporate form's single most valuable asset of limited liability.<sup>139</sup> "It is legitimate for [people] to stake only a part of their fortune on an enterprise."<sup>140</sup> When a corporation abuses the protection provided by the corporate form as a vehicle to achieve an unjust result, courts would remove limited liability. This removal is known as piercing the corporate veil.<sup>141</sup> All that veil-piercing consists of is enforcing a judgement against a shareholder of a corporation for the acts of that corporation.<sup>142</sup> The two types of veil-piercing used are alter ego and mere instrumentality theories.<sup>143</sup> Both theories involve proving that the two entities were so intermingled that they ceased to exist as separate entities.<sup>144</sup> However, some jurisdictions require fraud in order to pierce the corporate veil.<sup>145</sup>

When a parent company completely dominates and controls the subsidiary or operates the subsidiary as a business conduit of the parent company, the subsidiary is considered an alter ego of the parent. If the subsidiary is an alter ego, then a court may pierce the corporate veil and hold the parent liable for the acts of the subsidiary.<sup>146</sup> If the corporation is established to perpetrate a fraud or to commit an illegal act, or if the parent drains the subsidiary's assets, limited liability will not apply, and the veil will be pierced.<sup>147</sup> The existence of interlocking directorates is not enough to pierce a corporate veil where there is no evidence of fraud or wrongdoing on the part of the parent.<sup>148</sup> Neither one hundred percent ownership of the subsidiary by the parent nor the parent having the same officers as the

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138. Marilyn Blumberg Cane & Robert Barnett, *Piercing the Corporate Veil in Florida: Defining Improper Conduct*, 21 NOVA L. REV. 663, 665 (Winter 1997) (internal quotations omitted) (quoting Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991)).

139. *Id.* Liability after a corporate investment usually will not exceed the amount invested.

140. *Id.* (internal quotes omitted) (quoting Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193-94 (1929)).

141. *Id.*

142. *See id.* at 666.

143. Cane, *supra* note 138, at 667.

144. *Id.*

145. *Id.*

146. *United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

147. *Id.*

148. *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988).

subsidiary is, by itself, sufficient to pierce the veil under the alter ego theory.<sup>149</sup>

In alter ego, the parent actually controls the subsidiary without regard to its being a distinct entity, so the two are but one entity. The acts of one are therefore the acts of all, and the veil may be pierced.<sup>150</sup> The following factors indicate that a subsidiary is the alter ego of a parent: 1) commonality of stock ownership; 2) commonality of directors and owners; 3) commonality of business departments; 4) consolidated financial statements and tax returns; 5) the parent finances the subsidiary; 6) the parent created or caused the incorporation of the subsidiary; 7) the subsidiary operates on an extremely inadequate amount of capital; 8) the parent pays the salaries and expenses of the subsidiary; 9) the subsidiary receives business based solely upon grant of the parent; 10) the parent uses the subsidiary's property as if it were its own; 11) the daily operations of the two entities are not kept separate; and 12) the subsidiary does not practice the usual corporate formalities.<sup>151</sup>

The mere instrumentality theory requires control just like the alter ego theory. However, the exact wording of the theory deviates from the alter ego theory. The control must be present to such an extent that the subservient company has no distinct corporate interests of its own and operates only to achieve the purposes of the parent corporation.<sup>152</sup> A domination of finances, policies, and practices that control the corporation must occur so that the subsidiary has "no separate mind, will [,] or existence."<sup>153</sup> The difference between alter ego and mere instrumentality is that with mere instrumentality, there are no factors; there are simply three concrete elements: 1) control by the parent company; 2) the control exercised by the parent was used to perpetrate a fraud or worse; and 3) the control caused the specific injury complained of in that case.<sup>154</sup> The courts acknowledge that although a parent is an entity unique from its subsidiary, sometimes the corporate fiction must be overlooked to inhibit fraud. In such a case, the subsidiary must be treated as an instrumentality of the parent.<sup>155</sup>

The Fifth Circuit believes no direct liability for parent corporations exists under CERCLA unless the corporate veil can be pierced.<sup>156</sup> This circuit also limits veil-piercing to situations where the corporate form is used

149. *Jon-T Chem.*, 768 F.2d at 691.

150. *Fisser v. International Bank*, 282 F.2d 231, 234 (2d Cir. 1960).

151. *Jon-T Chem.*, 768 F.2d at 691-92.

152. *Id.* at 691.

153. *Id.*

154. *Fisser*, 282 F.2d at 238.

155. *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 687 (Del. 1959).

156. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990).

as a sham, to perpetrate fraud, or solely to avoid personal liability.<sup>157</sup> The Eastern District of Louisiana agrees that a parent may be held liable under CERCLA only if the veil can be pierced.<sup>158</sup> The only problem with this theory is that the conditions under which the veil may be pierced are different in each state. In California, for example, one may pierce the veil when the unity between the parent and the subsidiary causes their separate personalities to no longer exist and adherence to the corporate form would promote injustice.<sup>159</sup> California's reasoning differs from many states' veil-piercing laws and illustrates the need for uniformity in federal CERCLA actions.

To complicate the matter even further, some courts apply the federal veil-piercing standard when deciding parent corporation liability under CERCLA.<sup>160</sup> A district court in Massachusetts applied federal veil-piercing standards in reviewing CERCLA claims against parent companies.<sup>161</sup> The court's reasoning was that policies underlying CERCLA directed a federal veil-piercing review.<sup>162</sup> The Third Circuit also felt it was necessary to use federal veil-piercing standards in order to achieve uniformity in the application of CERCLA.<sup>163</sup> Remember, piercing the corporate veil is not the only way in which a parent can be held liable for the acts of its subsidiaries; there is also a control test by which a parent could be held liable as an operator under CERCLA.<sup>164</sup>

Many courts allow for both the actual control standard to be used in finding direct CERCLA liability, and veil-piercing to be used to find indirect liability for parent companies. The test under the actual control standard is whether or not the parent substantially and actively participates in the day-to-day activities of the subsidiary company.<sup>165</sup> The type of control necessary can also be expressed as control which evinces the parent's "exclusive domination . . . to the point that the subsidiary no longer has legal or

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157. *Id.*

158. *Trinity Indus., Inc. v. Dixie Carriers, Inc.*, No. 90-2349, 1992 WL 161123 at \*3 (E.D. La. June 24, 1992).

159. Aronovsky, *supra* note 6, at 431.

160. *See, e.g., In re Acushnet River*, 675 F. Supp. 22, 31 (D. Mass. 1987).

161. *Id.* at 31.

162. *Id.* at 32.

163. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993).

164. 42 U.S.C. §§ 9601(20)(A)–(21) (1994 & Supp. 1996).

165. *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 563 (3d Cir. 1997); *Martignetti v. Haigh-Farr, Inc.*, 680 N.E.2d 1131, 1138 (Mass. 1997).

independent significance of its own."<sup>166</sup> Direct liability under operator status is conferred when the parent has such extreme control over the subsidiary's activity that it becomes an operator subject to direct liability.<sup>167</sup>

There must be more than mere ownership and the control that is incidental to ownership to find parent liability under CERCLA.<sup>168</sup> Owning stock is not enough;<sup>169</sup> there must be actual participation in the conduct that led to the release causing CERCLA liability.<sup>170</sup> The normal amount of oversight that any prudent investor would give to an investment is not construed as worthy of direct liability, although it does represent a certain degree of control.<sup>171</sup> Some courts narrow the control test to require that the parent be actively involved in the day-to-day operations of the actual facility that is the subject of the CERCLA action.<sup>172</sup> The actual control test does not appear to differ wholeheartedly from veil-piercing standards, but the distinction will become important in the context of the *Bestfoods* case.

One last important issue that often presented itself in the cases before *Bestfoods* was corporate officer liability. An officer of a corporation charged with CERCLA violations is not liable unless that officer spent a lot of time at the actual facility where the release was made, had the opportunity to participate in the illegal release, and directed such release.<sup>173</sup>

It is important to understand that this was the mindset of the courts as the *Bestfoods* case came to the docket. There were two forms of liability for parent corporations under CERCLA: a parent could be directly liable as an operator of the polluting subsidiary, or a parent could be indirectly liable as an owner of the polluting subsidiary through veil-piercing.

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166. *E.g.*, *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (1998) (citing *Outokumpu Eng'g Enter. v. Kvaerner Enviropower, Inc.*, 685 A.2d 724 (Del. Super. Ct. 1996)).

167. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 28 (1st Cir. 1990).

168. *Id.* at 27; *See generally Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929).

169. *E.g.*, *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 58 (N.Y. 1926) (Cardozo, J.).

170. *E.g.*, *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

171. *E.g.*, *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 563 (3d Cir. 1997).

172. *E.g.*, *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220 (3d Cir. 1993).

173. *See, e.g.*, *Riverside Mkt. Dev. Corp. v. International Bldg. Prod., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991).

V. HISTORY OF *UNITED STATES V. BESTFOODS*A. *Facts of the Case*

The contaminated site ("The Site") which is the subject of the *Bestfoods* case is located near Muskegon, Michigan. It is a rural setting in western Michigan. There is a southeasterly flow of groundwater beneath The Site toward The Unnamed Tributary and Little Bear Creek. From 1959 until 1986, the Site was used by many chemical companies to produce pharmaceutical, veterinary, and agricultural synthetic, organic, and intermediate chemicals.<sup>174</sup>

Ott Chemical Company ("Ott I") owned and operated The Site from 1957 until 1965. Then, in 1965, a different Ott Chemical Company ("Ott II") bought The Site. Ott II was a wholly-owned subsidiary of CPC International ("CPC").<sup>175</sup> CPC placed some of its own employees on the board of Ott II.<sup>176</sup> Ott II tendered The Site to Story Chemical Company ("STCC") in 1972. STCC was then declared bankrupt in 1977.<sup>177</sup>

Shortly thereafter, the Michigan Department of Natural Resources ("DNR") attempted to find new buyers for The Site to assist in its cleanup. They simultaneously investigated the extent of the environmental degradation and remedies available at The Site. DNR entered into negotiations with Aerojet-General Corporation ("Aerojet") and its subsidiary, Cordova Chemical Company ("Cordova"), which resulted in Cordova Chemical Company of California ("Cordova Cal."), Aerojet's wholly-owned subsidiary, purchased The Site from the STCC bankruptcy trustee. In 1978, Cordova Chemical Company of Michigan ("Cordova Mich.") bought the site from Cordova Cal. and owns it to this day. Operations, however, ceased at The Site in 1986.<sup>178</sup>

When tested in 1957, the groundwater beneath The Site was in a pure and potable condition. After the groundwater was again tested in 1964, seven years since chemical production had started, the groundwater showed contamination. This contamination was a result of pumping water into The Site for use in production and then pumping the water out of The Site.<sup>179</sup>

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174. *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 555 (W.D. Mich. 1991), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

175. CPC changed its name to Bestfoods shortly after litigation began.

176. Respondent's Brief at 5, *Bestfoods* (No. 97-454).

177. *CPC Int'l*, 777 F. Supp. at 555.

178. *Id.*

179. *Id.*

Because of waste disposal at The Site, surface water, groundwater, and soil were contaminated with a large volume of toxic substances.<sup>180</sup>

During the periods when Ott I and Ott II owned The Site, chemical wastewater was dumped into unlined, engineered lagoons on the northwestern edge of The Site. Many contaminants then seeped into the ground and local waters from the lagoons. No waste, however, was dumped into the lagoons when STCC or Cordova owned The Site.<sup>181</sup>

Ott I and II also buried hundreds of chemical-filled drums in a sandy pit on The Site. These drums eventually ruptured causing further soil contamination and water contamination through leachate. In addition, all of the owners through the present allowed major chemical overflows and spills, which they failed to clean up; instead, the materials were buried. In one such case, a train car full of hazardous chemicals spilled onto The Site's railroad tracks.<sup>182</sup>

The contamination eventually reached the water supply of the surrounding community. By 1981, the groundwater that was extracted looked like brown root beer and contained foam. The air had a foul stench from chemicals that permeated everything. The soil and grounds of The Site were purple from the toxins released. In addition, there were many containers randomly thrown about that were exploding, leaking, corroding, and crushed. Free roaming traces of phenol, methylene, benzene, methyl isocyanate, and chloride were on The Site.<sup>183</sup>

Regardless of how the contaminants entered the ground, they eventually reached, through soil movement and leaching, The Unnamed Tributary and Little Bear Creek. Ott I and Ott II attempted to use purge wells<sup>184</sup> to slow down the proliferation of hazardous materials. STCC and Cordova, however, did not make use of these purge wells, thus allowing an unchecked spread of contamination from the Site.<sup>185</sup>

Cordova Mich. and Cordova Cal. did not dump or bury waste. The two companies repaired the sewage system and equalization tanks, which were required for the sewage system to function properly, and all chemical waste was pumped offsite to a county treatment facility. Nevertheless, benzene

180. *Id.* at 555–56.

181. *Id.* at 556.

182. *CPC Int'l*, 777 F. Supp. at 556.

183. Kass, *supra* note 2, at 3.

184. *CPC Int'l*, 777 F. Supp. at 556. Purge wells are deep and wide wells that penetrate the earth far below the water table. When in operation, they pump water from the groundwater beneath a contaminated site and create a cone of depression whereby water will not flow past the site, but up into the well. Therefore, any contaminants will not pass beyond the site in question.

185. *Id.*

and one half dichloroethane, used exclusively on this site by the Cordova companies, was found in large quantities in the soil and groundwater.<sup>186</sup>

In 1981, federal action began when the EPA investigated The Site. By 1982, the EPA placed The Site on the national priority list and ranked The Site the 137th most in need of federal remedial action. As of 1991, the EPA had a three-phased plan to repair the groundwater, surface water, and soil in and surrounding The Site. Implementation of the plan will cost many millions of dollars.<sup>187</sup>

## B. *Procedural Posture of the Case*

This litigation included many consolidated claims regarding who should be held liable for cleanup costs under CERCLA.<sup>188</sup> CPC, Aerojet, Cordova Mich., the Michigan DNR, and the United States were all parties to this action.<sup>189</sup> In May and June of 1991, the United States District Court for the Western District of Michigan conducted a fifteen-day trial to determine who was responsible for cleanup costs at the site in question.<sup>190</sup> There was a windstorm of cross-claims, counterclaims, and contribution claims.<sup>191</sup> The district court then consolidated the case into three phases: remedy, insurance, and liability.<sup>192</sup> The trial on the first phase of liability included twenty-nine live testimonial witnesses, 2300 exhibits, and dozens of transcribed depositions.<sup>193</sup> The trial court found that CPC, Cordova, and Aerojet were liable as operators under CERCLA.<sup>194</sup>

The United States Court of Appeals for the Sixth Circuit, ruling with a divided panel,<sup>195</sup> first reversed in part and remanded the case back to the district court.<sup>196</sup> The court of appeals then granted a rehearing *en banc* and vacated its previous judgement.<sup>197</sup> In the court of appeals' second swing at the plate, it again reversed in part and remanded by a seven-to-six majority.<sup>198</sup> The United States Supreme Court granted certiorari<sup>199</sup> to resolve

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186. *Id.*

187. *Id.*

188. *Id.*; 42 U.S.C. §§ 9607, 9613 et seq.

189. *CPC Int'l*, 777 F. Supp. at 549.

190. *Id.* at 555-70.

191. *United States v. Bestfoods*, 118 S. Ct. 1876, 1883 (1998).

192. *Id.*

193. *CPC Int'l*, 777 F. Supp. at 554.

194. *Id.* at 581.

195. *Bestfoods*, 118 S. Ct. at 1883.

196. *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584, 593 (6th Cir. 1995).

197. *United States v. Cordova Chem. Co. of Mich.*, 67 F.3d 586, 586 (6th Cir. 1995).

198. *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 583 (6th Cir. 1997), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998)

the conflict between the circuits regarding parent corporation liability under CERCLA.<sup>200</sup> The Court heard the case on March 24, 1998 and made its ruling on June 8, 1998.<sup>201</sup>

### C. *The District Court Decision*

CERCLA, according to the district court, imposes strict, joint and several liability whenever there is a release at a site, and the statute must be interpreted broadly to avoid frustrating its remedial purpose.<sup>202</sup> The court held that liability under CERCLA could attach to a parent corporation in two ways: either directly, as operator of the subsidiary, or indirectly, when the corporate veil could be pierced.<sup>203</sup>

Liability through operator status occurs only when the parent exerts influence or power over the subsidiary by forcefully participating in and exerting control over the subsidiary's business operations during the time of the waste disposal.<sup>204</sup> Oversight of the subsidiary that is consistent with the investment relationship will not create such liability.<sup>205</sup> To determine if the appropriate "nexus of control"<sup>206</sup> was present, the court considered the following factors: 1) the parent's representation on the subsidiary's board of directors; 2) the parent's management of the subsidiary; 3) the parent's daily involvement with the subsidiary; 4) the overlapping policies between the parent and the subsidiary; and 5) management, waste disposal, finance, and personnel policies.<sup>207</sup>

The district court also ruled that that a parent could be held liable through indirect or vicarious liability via traditional state law governed methods of veil-piercing.<sup>208</sup> In Michigan, a three-pronged veil-piercing test is used to "prevent fraud, illegality or injustice."<sup>209</sup> The elements of the test require the following: 1) that the subsidiary is an instrumentality of the parent; 2) that the limited liability between the parent and the subsidiary was specifically used to perpetrate a fraud or evil; and 3) that the fraud or evil

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199. *United States v. CPC Int'l, Inc.*, 118 S. Ct. 621 (1997), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

200. *Bestfoods*, 118 S. Ct. at 1884.

201. *Id.* at 1876.

202. *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 554, 571-72 (W.D. Mich. 1991), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

203. *Bestfoods*, 118 S. Ct. at 1883; *CPC Int'l*, 777 F. Supp. at 572.

204. *CPC Int'l*, 777 F. Supp. at 573.

205. *Id.*

206. *Id.* at 577.

207. *Id.* at 573.

208. *Id.* at 574.

209. *CPC Int'l*, 777 F. Supp. at 574.



caused the injury to the plaintiff.<sup>210</sup> Michigan law allows for an exception in that veil-piercing may also be warranted when it is done to serve the interests of justice.<sup>211</sup> The fiction of separate corporate entities is disregarded if the two companies have identical interests so as to suggest that the subsidiary was an alter ego of the parent.<sup>212</sup>

The court reasoned that CPC was directly liable as an operator with regard to The Site because it significantly controlled its subsidiary's decisionmaking and business, even though neither CPC nor its former subsidiary still owned The Site.<sup>213</sup> Internally, CPC installed its officers on the board of Ott II, and externally, CPC imposed policies of development on Ott II.<sup>214</sup> These actions established, for the trial court, that CPC reached the nexus of control such that they assumed responsibility for the release of hazardous waste.<sup>215</sup> In addition, Cordova Cal. was subject to indirect CERCLA owner liability through veil-piercing because its subsidiary owned the site in question; Cordova Cal. was the sole shareholder of Cordova Mich. stock, and there was an identity of interest between the companies.<sup>216</sup> The intermediate parent here exercised dominion and control over its subsidiary to the point where the corporate fiction ceased to exist, and the parent was therefore held liable.<sup>217</sup>

This decision established that the United States District Court for the Western District of Michigan would no longer allow parent corporations to escape liability under CERCLA. It seemed like an important victory for the environmental movement in the United States. However, The Court of Appeals for the Sixth Circuit of the United States added its two cents to the issue.

#### D. *The Court of Appeals Decision*

The Court of Appeals for the Sixth Circuit reversed in part and remanded after rehearing the case.<sup>218</sup> The court held, like in the district court decision,<sup>219</sup> that it would not interpret CERCLA in such a way that frustrated

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 574-75.

214. *CPC Int'l*, 777 F. Supp. at 574-75.

215. *Id.* at 577.

216. *Id.* at 578-79.

217. *Id.*

218. *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 586 (6th Cir. 1997), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

219. *CPC Int'l*, 777 F. Supp. at 571-72.

CERCLA's underlying policy.<sup>220</sup> However, it limited the deference it would give to the statute in that it would only assess liability on those parties that were culpable, or by some realistic measure contributed to the creation of the harmful conditions.<sup>221</sup> The court refused to hold parent corporations liable for the acts of their subsidiaries unless the corporate veil could be pierced, thus rejecting the district court's view that actual control could bring about direct liability.<sup>222</sup>

The focus of the opinion was whether the parent abused the corporate form in such a way that the separation between corporation and stockholder disappeared.<sup>223</sup> The court then applied Michigan state law with regard to veil-piercing, just as the district court did.<sup>224</sup> However, in applying the Michigan veil-piercing standard, the court ruled that the facts in this case did not warrant a piercing of the corporate veil.<sup>225</sup> While CPC was found to have had an active role with Cordova, the court found that the degree of control it exercised did not force the separate personalities of parent and subsidiary to cease to exist. In addition, there was no showing that the corporate form was utilized to accomplish fraud or wrongdoing.<sup>226</sup> The court also let Cordova Cal. off the hook by pronouncing that its brief period of ownership, before it transferred The Site to Cordova Mich., did not put it in a position to incur previous owner liability under CERCLA.<sup>227</sup>

The Court of Appeals for the Sixth Circuit's ruling in this case accomplished three things.<sup>228</sup> First, it allowed two potentially liable companies with deep pockets to escape liability for environmental crimes for which they clearly should have been responsible under CERCLA.<sup>229</sup> Second, it set a precedent calling for the use of state law to determine parent corporation liability under CERCLA.<sup>230</sup> Third, the court removed the possibility of direct operator-status liability for parent corporations under CERCLA.<sup>231</sup> Contrary to its pontifications in the beginning of the opinion,<sup>232</sup> it would seem that the court did indeed frustrate the remedial purpose of

220. *Cordova Chem. Co. of Mich.*, 113 F.3d at 577.

221. *Id.* at 578.

222. *Id.* at 580.

223. *Id.*

224. *Id.*

225. *Cordova Chem. Co. of Mich.*, 113 F.3d at 581.

226. *Id.*

227. *Id.* at 583.

228. *Id.* at 572.

229. 42 U.S.C. § 9607(a)(3) (1994).

230. *Cordova Chem. Co. of Mich.*, 113 F.3d at 580.

231. *Id.* at 580.

232. *Id.* at 577.

CERCLA. In one ruling, the Sixth Circuit Court of Appeals managed to set the environmental cause back eighteen years.

## VI. *UNITED STATES V. BESTFOODS*

### A. *Petitioner's Argument*

There were three briefs submitted in support of the United States, the petitioner, in *United States v. Bestfoods*.<sup>233</sup> The United States submitted a brief and a reply brief,<sup>234</sup> and the respondent, Michigan Department of Environmental Quality,<sup>235</sup> submitted a brief in support of the petitioner.<sup>236</sup> According to the Solicitor General for the United States, The Sixth Circuit Court of Appeals misapplied CERCLA, the most important statute which allows the United States to remedy public dangers created by toxic materials.<sup>237</sup> The Court of Appeals' ruling absolved all parent corporations of liability under CERCLA even when they actively participate in the operations of the polluting site.<sup>238</sup> By only allowing parent liability when the circumstances warrant a piercing of the corporate veil, the Sixth Circuit is alienating the broader view held by the First, Second, Third, and Eleventh Circuit Courts of Appeals, which all allow for some sort of control test to find direct liability for parents as operators under CERCLA.<sup>239</sup>

In the petitioner's opinion, this case's main issue is one of simple statutory construction.<sup>240</sup> State common law veil-piercing standards should not apply.<sup>241</sup> The United States wants the Supreme Court to "apply the [CERCLA] statute as Congress wrote it."<sup>242</sup> The definition of "owner" in CERCLA specifically excludes stockholders who do not participate in

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233. Respondent Michigan Department of Environmental Quality's Brief in Support of Petitioner (No. 97-454); Petitioner's Brief (No. 97-454); Petitioner's Reply Brief (No. 97-454).

234. Petitioner's Brief at I, *Bestfoods* (No. 97-454); Petitioner's Reply Brief at I, *Bestfoods* (No. 97-454).

235. Formerly known as Michigan Department of Natural Resources.

236. Respondent Michigan Department of Environmental Quality's Brief in Support of Petitioner at I, *Bestfoods* (No. 97-454).

237. Petitioner's Brief at 16, *Bestfoods* (No. 97-454).

238. *Id.*

239. Respondent Michigan Department of Environmental Quality's Brief in Support of Petitioner at 14, *Bestfoods* (No. 97-454).

240. *Id.* at 6.

241. *Id.*

242. Petitioner's Reply Brief at 15, *Bestfoods* (No. 97-454) (citing *Dunn v. CFTC*, 117 S. Ct. 913, 916 (1997)).

managing the facility where the release occurred.<sup>243</sup> This suggests that a stockholder who does participate in the management of the site is susceptible to liability.<sup>244</sup> The statutory term "operator" in CERCLA must be interpreted in terms of its plain and ordinary meaning as opposed to an unusual or technical meaning.<sup>245</sup> The plain meaning of "to operate" is to "direct the workings of [or] to manage."<sup>246</sup>

Congress wanted to impose liability on any operator of the site in question, regardless of protection provided by the corporate form.<sup>247</sup> CPC, the United States argues, was an operator as defined by CERCLA, because it actively controlled the operations of the facility where the illegal release was made.<sup>248</sup> Understand, however, that the petitioner is no longer referring to active control of the subsidiary's business; instead, it is saying that CPC had extensive control over the decision-making at The Site, which therefore shows that CPC operated The Site.<sup>249</sup> This is direct liability in its most forward form; there is nothing vicarious about it; CPC physically controlled operations at The Site.<sup>250</sup> CPC's argument that operator status is only conferred when a corporation mechanically operates a polluting facility would produce an absurd result because parents could control decision-making at a facility but others would be subject to liability for the parents' decisions.<sup>251</sup> Any sort of managerial control over the facility is enough to obtain CERCLA liability over a parent.<sup>252</sup> The United States suggests that there could never be anything bad, even considering limited liability, about requiring a corporation to pay for the harm it causes.<sup>253</sup>

The petitioner also argued that a federal veil-piercing standard must be used instead of the various state standards when interpreting parent liability under CERCLA.<sup>254</sup> CERCLA specifically precludes the use of all state

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243. 42 U.S.C. § 9601(20)(A)(iii) (1994).

244. Respondent Michigan Department of Environmental Quality's Brief in Support of Petitioner at 7, *Bestfoods* (No. 97-454) (citing *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 587 (6th Cir. 1997), *rev'd sub nom* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998)).

245. Petitioner's Brief at 20, *Bestfoods* (No. 97-454).

246. *Id.* (internal quotations omitted) (citing *e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

247. *Id.* at 25.

248. Petitioner's Reply Brief at 1, *Bestfoods* (No. 97-454).

249. *Id.* at 3.

250. *Id.*

251. *See id.* at 5.

252. *Id.* at 6.

253. Petitioner's Reply Brief at 17, *Bestfoods* (No. 97-454).

254. Petitioner's Brief at 32, *Bestfoods* (No. 97-454).

common law defenses in attempting to escape owner or operator liability.<sup>255</sup> Therefore, the use of the state veil-piercing doctrine is impossible under CERCLA. In addition, all fifty states have different veil-piercing standards. Resorting to all of those different standards would be inconsistent, unpredictable, *ad hoc*, and inappropriate in terms of CERCLA.<sup>256</sup> The statute must be interpreted uniformly across the United States, employing only federal veil-piercing standards.<sup>257</sup>

As its final argument, Petitioner discusses the fact that CPC placed its own corporate officers on the boards of directors of Ott II.<sup>258</sup> It is normal for a corporate parent to place its own officers on the board of a subsidiary, and that alone does not impute liability under CERCLA.<sup>259</sup> However, CPC's officers on the board of Ott II performed their duties on behalf of CPC and not on behalf of Cordova; therefore, they represent an instrumentality of CPC, which directed the functioning of Ott II's facility.<sup>260</sup>

The petitioner presented a lucid and coherent argument. Nothing presented in the argument was untrue or vague. However, it seems that because the United States was on the side of what is right and good in the world, it felt it did not have to present an aggressive argument that would induce an emotional reaction in the Supreme Court Justices. It was a good argument that made its point effectively, but it did not call for decisive action to cleanup a life-threatening source of pollution.

#### B. Respondent's Argument

There were four briefs submitted in support of Bestfoods, the Respondent.<sup>261</sup> Bestfoods itself submitted a brief and a supplemental brief,<sup>262</sup> and the other two briefs were amicus briefs submitted by The Washington Legal Foundation and The United States Business and Industrial Council.<sup>263</sup> Respondent argued that Congress did not give the courts a license to develop

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255. 42 U.S.C. § 9607(a) (1994); Petitioner's Reply Brief at 12, *Bestfoods* (No. 97-454).

256. Petitioner's Reply Brief at 16, *Bestfoods* (No. 97-454).

257. *See id.* at 16.

258. Petitioner's Brief at 45, *Bestfoods* (No. 97-454).

259. *Id.* at 44.

260. *Id.* at 45.

261. Formerly doing business as CPC International.

262. Respondent's Brief, *Bestfoods*, (No. 97-454); Respondent's Supplemental Brief, *Bestfoods*, (No. 97-454).

263. Amicus Brief of the Washington Legal Foundation in Support of Respondents, *Bestfoods*, (No. 97-454); Amicus Brief of United States Business and Industrial Council in Support of Respondents, *Bestfoods*, (No. 97-454).

*ad hoc* rules of corporate parent liability in terms of CERCLA.<sup>264</sup> The courts are not permitted to legislate via CERCLA.<sup>265</sup> Federal intervention into the basic premises of state corporation law will destroy the value of incorporation<sup>266</sup> and will devastate commercial relationships.<sup>267</sup>

It would not serve justice to “sweep aside longstanding principles” of limited liability.<sup>268</sup> Nothing in CERCLA suggests that Congress wanted to override common law corporate principles.<sup>269</sup> Congress must act against the backdrop of the complete *corpus juris* of the states.<sup>270</sup> Therefore, a matter interpreted in a federal statute that is not addressed specifically must be left to disposition via state law.<sup>271</sup> Because parent corporation liability is not discussed in CERCLA, it follows that state law should be used in deciding when and to what extent a parent can be held liable for the acts of its subsidiary.<sup>272</sup>

The term “corporation” does not include its shareholders.<sup>273</sup> Allowing the courts to create an entire body of federal law from “whole cloth” will necessarily destroy state sovereignty.<sup>274</sup> Respondent believes that creating this federal standard would constitute declaring “open season” on all parent corporations for the illegal acts of their subsidiaries.<sup>275</sup> There must be significant conflict between the federal goals and the state law in order to abrogate the state law.<sup>276</sup> Moreover, in the arena of corporate law, there is a strong presumption that state law must be applied to resolve parent corporation liability.<sup>277</sup>

The need for national uniformity is not a strong enough need to displace state corporation law.<sup>278</sup> There is a heavy burden on courts to use state and

264. Respondent's Brief at i, *Bestfoods* (No. 97-454).

265. See Amicus Brief of the Washington Legal Foundation in Support of Respondents at 2, *Bestfoods* (No. 97-454).

266. *Id.* at 19.

267. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 23, *Bestfoods* (No. 97-454).

268. Respondent's Brief at i, *Bestfoods* (No. 97-454).

269. *Id.* at 29.

270. *Id.* at 28.

271. *Id.*

272. See *id.*

273. Respondent's Brief at 20, *Bestfoods* (No. 97-454).

274. *Id.* at 12.

275. *Id.* at 14.

276. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 4-5, *Bestfoods* (No. 97-454).

277. *Id.* at 5.

278. *Id.* at 7.

not federal law when applying a federal statute.<sup>279</sup> It must be shown that national uniformity is required, the state law would frustrate the federal policy, and commercial relationships would not suffer in order to supplant the state law.<sup>280</sup>

State veil-piercing law does not undermine CERCLA's purpose of holding liable any potentially responsible parties.<sup>281</sup> Using state law provides the proper balance between CERCLA's imposition of costs and protecting the corporate form.<sup>282</sup> If the parent has a sham subsidiary, the courts may still attack the parent, but corporate limited liability is held inviolate.<sup>283</sup> States are interested in protecting their citizens from environmental contamination and will adjust their veil-piercing standards accordingly in order to snare the widest net of potentially liable parent corporations.<sup>284</sup>

*In arguendo*, the different states have somewhat uniform veil-piercing laws. Basic uniformity can be accomplished by allowing the states to maintain their sovereignty.<sup>285</sup> Veil-piercing in most states requires, with some variation, two basic elements: 1) uniformity in interest so that the separate corporate personalities no longer exist; and 2) fraud or wrongdoing in use of the corporate form. In addition, the only reason that the petitioner wants to apply federal veil-piercing law is because fraud is not a necessary element under federal law.<sup>286</sup> In Michigan, fraud is a necessary element to pierce the veil, and the respondent in this case is not guilty of any fraud.<sup>287</sup>

When Congress intends that there be a control test designed to find liable parties included in a statute, they simply put it in the text of the statute.<sup>288</sup> Congress put a control test in the Securities and Exchange Act because it intended to do so in that case.<sup>289</sup> A parent can only be held liable as an operator if they mechanically operate the site where the pollution has

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279. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 18, *Bestfoods* (No. 97-454).

280. *Id.* at 18-19.

281. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 16, *Bestfoods* (No. 97-454).

282. *Id.* at 14.

283. See Amicus Brief of United States Business and Industrial Council in Support of Respondents at 4, *Bestfoods* (No. 97-454).

284. *Id.* at 22.

285. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 9, *Bestfoods* (No. 97-454).

286. *Id.*

287. *Id.*

288. Respondent's Brief at 24, *Bestfoods* (No. 97-454).

289. 15 U.S.C. § 78t (a) (1994).

taken place.<sup>290</sup> It would be improper to lower the threshold of vicarious liability by suggesting that control over the subsidiary's business operations indicated liability for an entity separate from the subsidiary.<sup>291</sup> Actual control over the subsidiary is irrelevant, only operation of the facility in question is relevant, and CPC did not mechanically operate the facility.<sup>292</sup>

The Supreme Court must not review evidence for credibility or discuss specific facts.<sup>293</sup> The factual findings of the lower courts must be honored, and the District Courts did not find that CPC was an operator of The Site.<sup>294</sup> CPC did place some of its employees at the site, but that is indicative of normal stockholder oversight.<sup>295</sup> Ott II made its own decisions, derived its own revenues, and there was no abnormal intervention from CPC.<sup>296</sup>

This argument is a textbook corporate America argument. It essentially states that the courts must protect the profit-making enterprises of the nation at the expense of the environment. Unfortunately for the environment, the argument makes perfect legal sense. So, while one might want to disagree with the points contained therein from an environmental and emotional standpoint, he or she must submit that corporations and shareholders do have certain rights, as do states.

### C. *The Supreme Court Opinion*

Justice Souter did not pull any punches when he wrote for an unanimous court in *United States v. Bestfoods*. He boldly stated that a parent corporation would not be held liable for violations under CERCLA if it exercised control over its subsidiary's operations.<sup>297</sup> However, the resolution of this case did establish two ways in which a parent corporation can be held liable for the acts of its subsidiary under CERCLA.<sup>298</sup> A parent corporation will be attached under CERCLA only when the corporate veil can be pierced and when the parent actually participated in the operations of the facility where the release of hazardous substances was made.<sup>299</sup>

The basic American tenet that a parent corporation will not be held liable for acts perpetrated by its subsidiaries guided the Court through its

290. Respondent's Brief at 19, *Bestfoods* (No. 97-454).

291. *See id.* at 7.

292. *Id.*

293. Respondent's Supplemental Brief at 1-2, *Bestfoods* (No. 97-454).

294. *Id.* at 2.

295. Respondent's Brief at 5, *Bestfoods* (No. 97-454).

296. *Id.*

297. *United States v. Bestfoods*, 118 S. Ct. 1876, 1881 (1998).

298. *Id.* at 1886 n.12.

299. *Id.* at 1881.



reasoning.<sup>300</sup> The control that is incidental to stock ownership cannot make a parent liable for a subsidiary's acts beyond the assets of the subsidiary.<sup>301</sup> The Court held that the control incidental to stock ownership includes the formation of corporate guidelines, the appointment of officers, and all other acts normal to the parent-subsidiary relationship.<sup>302</sup> Even the subsidiary having the identical board of directors as the parent is normal to the shareholder relationship.<sup>303</sup> "[T]he congressional silence is audible" in CERCLA.<sup>304</sup> Nothing in the act rejects the long-standing principal that parent corporations are protected by limited liability.<sup>305</sup>

However, the Court does note that it is equally fundamental to American law that when a shareholder misuses the corporate form, the corporate veil may be pierced, and the shareholder will therefore be subject to liability.<sup>306</sup> CERCLA does not reject this principal of corporate law just as it does not reject the principal of limited liability.<sup>307</sup> "[I]n order to abrogate a common law principle, the statute must speak directly to the question addressed by common law."<sup>308</sup> For a matter as fundamental as parent corporation liability to be omitted from a comprehensive statute like CERCLA means that it was left out for a reason.<sup>309</sup> The Court, therefore, agreed with the Sixth Circuit Court of Appeals that a parent corporation may be held derivatively liable for the acts of its subsidiary under CERCLA when and only when the corporate veil may be pierced under state law.<sup>310</sup>

The Court continued by stating that there is a significant difference between liability as an owner versus liability as an operator, since CERCLA provides for both.<sup>311</sup> Piercing the corporate veil applies to liability for an owner, but there may be a case where the parent corporation is an operator as defined by the Act.<sup>312</sup> A parent may be liable for its own acts as the operator of the facility which is owned by its subsidiary if the CERCLA violation can be traced to the parent and the parent directly participated in the violation.<sup>313</sup>

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300. *See id.* at 1884.

301. *Id.*

302. *Bestfoods*, 118 S. Ct. at 1884.

303. *See id.*

304. *Id.* at 1885.

305. *Id.*

306. *Id.*

307. *Bestfoods*, 118 S. Ct. at 1885.

308. *Id.* (internal quotations omitted) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

309. *Id.*

310. *Id.* at 1885-86.

311. *Id.* at 1889.

312. *Bestfoods*, 118 S. Ct. at 1886.

313. *Id.* at 1886.

Therefore, while indirect liability may be limited to cases where the corporate veil may be pierced, CERCLA's operator proviso deals with one's direct liability for his or her own actions.<sup>314</sup> A direct owner of a facility, a subcontractor, a malicious saboteur, a business partner, and even a parent corporation can be held liable.<sup>315</sup> In the case of operator status, state corporate law and the distinction between parent and subsidiary is irrelevant.<sup>316</sup> The critical inquiry is whether the parent operated the facility in question.<sup>316</sup> It follows that a parent whose veil cannot be pierced because it adhered to the traditional separation between parent and subsidiary may be held liable as operator if it intervenes on one occasion relating to the release of hazardous materials.<sup>317</sup>

In defining what it means to operate a facility, the court employed dictionary definitions, plain meanings, and common sense.<sup>318</sup> CERCLA meant something more than mere mechanical activation of pumps and valves when it used the word "operate" to describe those who are liable under the statute.<sup>319</sup> The Court ruled that the meaning of "to operate" should be construed in the "organizational sense" that was intended by CERCLA.<sup>320</sup> To operate means "to conduct the affairs of; to manage: operate a business."<sup>321</sup> Justice Souter then extended the meaning of "to operate" under CERCLA to mean directing, managing, or performing tasks directly related to the disposal of hazardous materials. This sharpened definition as applied to CERCLA also included institutional decisionmaking regarding "compliance with environmental regulations."<sup>322</sup> The Court of Appeals, therefore, correctly rejected the District Court's view of an actual control theory based direct liability.<sup>323</sup>

The Court rejected the actual control test for two reasons. First, the test inappropriately combined indirect and direct liability; second, it did not look at the parent relationship with the facility in question, but only at the parent's relationship with its subsidiary.<sup>324</sup> The District Court only considered CPC's one hundred percent ownership interest and the fact that it placed its own employees on Ott II's board of directors; thus, the court did

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314. *Id.*

315. *Id.*

316. *Id.*

317. *Bestfoods*, 118 S. Ct at 1886-87 n.12.

318. *See id.* at 1887.

319. *Id.* at 1889.

320. *Id.* at 1887.

321. *Id.*

322. *Bestfoods*, 118 S. Ct. at 1887.

323. *Id.*

324. *Id.*

not adequately analyze CPC's liability.<sup>325</sup> The Court then directed the District Court to consider the relationship between The Site and CPC on remand.<sup>326</sup>

Guidance was given as to what constitutes operation of the facility.<sup>327</sup> Again, a sole stockholder in a corporation has the right to supervise the subsidiary's finances, proscribe mandatory policies that the subsidiary must follow, and monitor the subsidiary's performance without liability attaching because of such actions.<sup>328</sup> The main question is: "in degree and detail, [are the] actions directed to the facility by . . . the parent . . . eccentric under accepted norms of parental oversight of a subsidiary's facility[?]"<sup>329</sup>

It is completely normal for a parent corporation to place its own officers on the board of directors of a subsidiary, and that fact alone may not establish parent corporation liability for the illegal acts of its subsidiary.<sup>330</sup> Common or dual officers can and do "change hats" when representing either the parent or the subsidiary, and the courts presume that they put on their subsidiary hats when they work for the subsidiary.<sup>331</sup> However, when it appears that an officer is acting in a manner that is congruent only with the interest of the parent while also deviating from well-established corporate norms, the presumption may be rebutted.<sup>332</sup>

In conclusion, the Court stated that CERCLA does not fundamentally alter or displace common law rules of limited liability.<sup>333</sup> If the actual control test were used as the standard, derivative liability through veil-piercing would be unnecessary.<sup>334</sup> CERCLA-specific corporate law doctrines are impermissible because they cast aside all traditional expectations of liability under CERCLA.<sup>335</sup>

The Court found adequate information contained in the record to support a belief that CPC did in fact operate The Site as defined by *Bestfoods*.<sup>336</sup> It therefore vacated the judgement of the Court of Appeals and remanded the case to the District Court to reconsider the issue in light of *Bestfoods*.<sup>337</sup>

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325. *See id.* at 1887-88.

326. *Id.* at 1888.

327. *Bestfoods*, 118 S. Ct. at 1889.

328. *Id.*

329. *Id.*

330. *Id.* at 1888.

331. *Id.*

332. *Bestfoods*, 118 S. Ct. at 1889 n.13.

333. *Id.* at 1889.

334. *Id.*

335. *Id.*

336. *Id.* at 1890.

337. *Bestfoods*, 118 S. Ct. at 1890.

#### D. *Brief Analysis of the Supreme Court Decision*

The two forms of finding liability announced in *Bestfoods*<sup>338</sup> allow the EPA and private CERCLA plaintiffs to know when they will be able to force a parent corporation to contribute to a cleanup effort. The Court pronounced bright line rules which, if violated, indicate corporate parent liability.<sup>339</sup> The guessing of the past is now over. However, there probably are many corporate parent boards of directors that alter their policies with regard to their subsidiaries in order to escape liability under the *Bestfoods* ruling but continue managing their subsidiaries as they see fit. If making profits at the expense of the environment is their corporate goal, it is assured that they will find a way to do it without violating the lines drawn in *Bestfoods*.

CERCLA's intent is clear: it is a comprehensive statute designed to attach liability onto every potentially responsible party.<sup>340</sup> It is inconceivable that Congress intended that parent corporations could escape liability based on fictional protections provided by the corporate form. The *Bestfoods* ruling allows parent corporations, which may have been deeply involved in the polluting activities of their subsidiaries, to escape liability.<sup>341</sup> The Court should have looked more deeply into the policy concerns that underlie CERCLA. If it had, it would have seen that the statute is specifically designed to prevent exactly what the Court allowed to happen.<sup>342</sup> Common law defenses are precluded when assessing CERCLA liability; only the defenses set forth in the text of the statute are effective.<sup>343</sup> By limiting parent liability to situations where the parent operated the facility in question,<sup>344</sup> the Court effectively demonstrated to potential polluting parents how to indirectly require that their subsidiaries pollute but get away with it in the process. A parent, for example, could place profit requirements on a subsidiary attainable only if it illegally dumped hazardous waste.

The Court of Appeals noted that the courts should not interpret CERCLA in such a way that frustrates its purpose.<sup>345</sup> However, the Supreme Court's decision to allow state law to determine whether the corporate veil should be pierced does frustrate CERCLA's purpose.<sup>346</sup> Unlike federal law, most state veil-piercing laws include an element of fraud that must be proven

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338. *Id.* at 1886 n.12.

339. *Id.* at 1876.

340. 42 U.S.C. §§ 9601–75 (1994 & Supp. 1996).

341. *See Bestfoods*, 118 S. Ct. at 1889.

342. *See* 42 U.S.C. § 9607(a) (1994).

343. *Id.* § 9607(b)(3) (1994).

344. *Bestfoods*, 118 S. Ct. at 1887.

345. *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 577 (6th Cir. 1997), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

346. *Bestfoods*, 118 S. Ct. at 1885–86.

in order to pierce the veil.<sup>347</sup> Under the Court's reasoning, a parent that has interfered with a subsidiary to the point where the corporate veil should be pierced, and has indirectly forced the subsidiary to pollute, but has not engaged in any deception or fraud will nevertheless be protected by the corporate form.<sup>348</sup> The use of state law to pierce the corporate veil under CERCLA frustrates the Act's purpose because federal veil-piercing law would necessarily provide for more parents' indirect liability under CERCLA. The purpose of CERCLA is to cleanup the environment by forcing responsible parties to pay for the cleanup.<sup>349</sup>

A state legislature or court system is now in the position to tailor its veil-piercing law with the intent to attract corporations that are interested in producing goods and not cleaning up the environmental pollutants they release. States could easily make the test for piercing the corporate veil narrower than it currently is in order to attract the worst element of rich, polluting companies. In terms of whether state or federal law applies in veil-piercing cases, "the congressional silence is audible."<sup>350</sup> Some recent cases that struggled to interpret *Bestfoods* have held that state law governs in veil-piercing inquiries.<sup>351</sup> Several courts have resolved the issue by relying on the Sixth Circuit's decision in *Donahey v. Bogle*,<sup>352</sup> which requires application of state law in veil-piercing cases.<sup>353</sup> However, there is a strong possibility that federal law may be held applicable in other jurisdictions. This issue requires a legislative solution.

In *Bestfoods*, the Supreme Court promoted form over function. While there now exist strict, uniform bounds by which a parent corporation may be held liable for the acts of its subsidiary under CERCLA,<sup>354</sup> if a parent corporation maintains a few formalities with regard to the corporate form, it is nevertheless immune from liability should the subsidiary be charged with a CERCLA violation. It is true that parent corporations now have more to fear than ever. Before *Bestfoods*, the law regarding parent corporation liability was confused and erratic at best.<sup>355</sup> Nevertheless, the circumstances by which a parent corporation will be held liable for the CERCLA violations

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347. Amicus Brief of the Washington Legal Foundation in Support of Respondents at 9, *Bestfoods* (No. 97-454).

348. See *Bestfoods*, 118 S. Ct. at 1889.

349. 42 U.S.C. §§ 9601-9675 (1994 & Supp. 1996).

350. *United States v. Green*, 33 F. Supp. 2d 203, 217 (W.D.N.Y. 1998) (citing *United States v. Bestfoods*, 118 S. Ct. 1876, 1885 (1998)).

351. E.g., *Browning-Ferris Indus. Of Ill., Inc. v. Ter Maat*, 13 F. Supp. 2d 756, 765 (N.D. Ill. 1998).

352. 129 F.3d 838 (6th Cir. 1997).

353. *Id.* at 843.

354. *Bestfoods*, 118 S. Ct. at 1886 n.12.

355. See *supra* note 33.

of its subsidiary under *Bestfoods* are narrow, including only when the corporate veil may be pierced under state law, and when the parent actively manages or operates the polluting facility.<sup>356</sup> Shareholders and parent corporations know how to protect themselves because of the *Bestfoods* decision.<sup>357</sup>

## VII. CONCLUSION

The environmental problem, which the Supreme Court tried to resolve in *Bestfoods*, is not merely legal in nature. It permeates deeply rooted social policies underlying CERCLA and the principle of limited liability.<sup>358</sup> From the first Superfund site, a coal tar sludge waste depository,<sup>359</sup> to present-day environmental catastrophes, all modern levels of economic activity have some effect on the environment. People prefer to "struggle along on [the] asphalt and concrete, in imitation of the short-lived transportation machines for which those hard surfaces were designed."<sup>360</sup> The use of agricultural chemicals has increased to over one billion tons per year since 1962, up nearly four hundred percent.<sup>361</sup> Humankind has developed a mind that separates it from the natural world.<sup>362</sup> To complicate matters, CERCLA, a statute designed to save the environment, is so confusing that courts stumble over its language and struggle to interpret it correctly.<sup>363</sup>

*Bestfoods* sheds light on the confusing area of CERCLA parent corporation liability.<sup>364</sup> One open issue is that of the safe limits for a parent in its oversight, advisory, and standard-setting role with its subsidiary.<sup>365</sup> Perhaps intentionally, *Bestfoods* did not draw a clear line on that issue. Already, a case has cited to *Bestfoods* questioning its ruling.<sup>366</sup> In the future,

356. *Bestfoods*, 118 S. Ct. at 1881.

357. George J. Weiner & Lara Bernstein Mathews, *Parent Corporation and Individual Liability under CERCLA after Bestfoods*, 13 NATURAL RESOURCES & ENVIRONMENT 456, 461 (1999).

358. See Aronovsky, *supra* note 6, at 461.

359. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989).

360. HOFF, *supra* note 9, at 93 (emphasis added).

361. Gore, *supra* note 8, at xix.

362. HOFF, *supra* note 9, at 77.

363. See *United States v. Cordova Chem. Co. of Mich.*, 67 F.3d 586 (6th Cir. 1995) (rehearing en banc granted on CERCLA action), *rev'd sub nom United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

364. Kass, *supra* note 2, at 3.

365. *Id.*

366. *United States v. Vitek Supply Corp.*, 151 F.3d 580 (1998).

new court decisions, corporate practices, and new CERCLA clarifications may resolve these still unresolved issues.<sup>367</sup>

Proponents of limited liability would argue that the theory of limited liability through corporate ownership has proven to be beneficial to the United States because the corporate structure insulates.<sup>368</sup> *Bestfoods* demonstrates that the idea of limited liability is alive and well in terms of CERCLA.<sup>369</sup> Direct parent corporation liability would discourage investment across the board.<sup>370</sup> Limited liability encourages growth because it allows investors to minimize their risks.<sup>371</sup> The purchaser of one share of a corporation is not forced to place her entire wealth at risk.<sup>372</sup> Finally, supporters of limited liability argue that it allows capital to flow to socially desirable but risky ventures.<sup>373</sup>

However, these arguments do not hold water in the environmental context. Limited liability has protected wealthy industrialists since the late 1830s.<sup>374</sup> It allows a parent corporation to avoid bearing the full social and economic costs of its actions.<sup>375</sup> The parent corporation is free to reap the full benefit of the subsidiary's production at the expense of the community which supports it without bearing the true cost of its activities.<sup>376</sup> Limited liability, therefore, merely provides an incentive to use a subsidiary as a shield. The parent can then shift the costs of environmental cleanup to involuntary contributors.<sup>377</sup> Involuntary contributors are residents of the community, recreational users of natural resources, and the government.<sup>378</sup> It is simply unconscionable to allow parent corporations to get rich while taxpayers and residents bear the environmental costs for the corporation's activities:

Economic analysis favors holding parent corporations of responsible parties liable for the outstanding portion of any judgement for hazardous waste clean-up costs and natural resource

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367. Kass, *supra* note 2, at 3.

368. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 23, *Bestfoods* (No. 97-454).

369. United States v. *Bestfoods*, 118 S. Ct. 1876, 1885 (1998).

370. Amicus Brief of United States Business and Industrial Council in Support of Respondents at 14, *Bestfoods* (No. 97-454).

371. *Harvard Liability*, *supra* note 5, at 988.

372. *Id.* at 989.

373. *Id.*

374. Aronovsky, *supra* note 6, at 429-30.

375. *Harvard Liability*, *supra* note 5, at 990.

376. *Id.*

377. *Id.* at 991.

378. *Id.* at 992.

damages. Application of this liability rule would internalize the risks of setting up subsidiary corporations to perform hazardous waste disposal activities. Therefore, corporations would have strong incentives to exercise care when delegating and overseeing hazardous waste disposal activities. In addition, application of the rule would reduce the exposure of involuntary creditors to the risk of releases of hazardous waste—a risk that they are ill-suited to avoid or bear. Finally, the rule would reduce the enforcement costs of cleaning up unsafe hazardous waste disposal facilities and restoring natural resources.<sup>379</sup>

In the future, the courts should use the social, economic, democratic, and policy factors underlying CERCLA to decide when limited liability should not apply.<sup>380</sup> Liability for environmental harms should be placed squarely on the shoulders of those who are in the best position to mitigate damages and bear the costs.<sup>381</sup> Parent corporations are in this position because they already have the oversight hierarchy in place and they can exert strong influence over polluting subsidiaries.<sup>382</sup> Parent corporations should not incur liability when they unwittingly play some part in the subsidiary's waste disposal activities,<sup>383</sup> but in the interests of economic efficiency, they should bear the costs of environmentally dangerous activities about which they knew or should have known.

Mother Nature is the last constant in this ever shrinking world. If CERCLA is to be the instrument of her savior, it must flourish, punishing all those who would attempt to poison and destroy her bounty. Economics, democracy, and recreation—these beliefs and activities exist because life exists, and without a life-supporting ecosystem, free from chemical pollutants, they will cease to exist.

*Christian A. Guzzano*

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379. *Id.* at 998 (internal citations omitted).

380. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997).

381. *Harvard Liability*, *supra* note 5, at 992–93.

382. *Id.* at 992.

383. *Aronovsky*, *supra* note 6, at 462.